



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

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Case no: PA05/2025

In the matter between:

GOODYEAR SOUTH AFRICA (PTY) LTD

Appellant

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA (NUMSA) OBO VUSUMZI JACOBS

& 53 OTHERS

First Respondent

AMON NYONDO N.O.

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 26 May 2026

This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Labour Appeal Court website, and released to SAFLII. The date and time for hand-down is deemed to be on 20 August 2026.

Coram: Masipa AJA, Tokota AJA et Moshoana AJA

JUDGMENT

MASIPA, AJAIntroduction

- [1] This appeal concerns the substantive fairness of the dismissal of 54 employees employed by the appellant at its mixing operations in Uitenhage. Although the employees were found guilty of insubordination, the commissioner concluded that dismissal was an inappropriate sanction and ordered their reinstatement. The Labour Court (Makhura J) dismissed a review application brought by the appellant. Leave to appeal having ultimately been granted on petition, the matter now serves before this Court.
- [2] The appeal does not concern whether the employees committed misconduct. Both the commissioner and the Labour Court found the employees guilty of insubordination. The central issue is whether the commissioner's determination that dismissal was too harsh a sanction was one that a reasonable decision-maker could reach.
- [3] A further development occurred after the arbitration award, the review proceedings, and the grant of leave to appeal. It is common cause that during or about August 2025, the appellant ceased its South African manufacturing operations and closed its manufacturing plant. The significance of that development was raised during oral argument. Whilst it does not bear upon the determination of the merits of the appeal, it may have implications for the practical consequences of the relief granted should the appeal fail.

Factual background

- [4] The appellant operated a tyre manufacturing business in South Africa. The individual respondents were employed in the Banbury Department, a department responsible for the mixing process utilised in the manufacture of tyres. The appellant regarded the uninterrupted operation of the Banbury mixing machines as important to maintaining production levels.
- [5] During March 2020, the appellant and the National Union of Metalworkers of South Africa (NUMSA), acting on behalf of employees in the Banbury Department, concluded a collective agreement to facilitate the continuous

operation of the mixing machines during meal and tea breaks. The arrangement required employees, in certain circumstances, to provide relief to fellow operators during break periods to ensure uninterrupted production.

- [6] During 2020, disagreements emerged concerning the implementation of the arrangement. NUMSA disputed aspects of its operation, and the matter ultimately became the subject of proceedings before the Commission for Conciliation, Mediation and Arbitration (the CCMA). The merits of that dispute are not for determination in this appeal. It is nevertheless common cause that, by March 2021, the disagreement remained unresolved and formed part of the industrial relations environment in which the events giving rise to the dismissals occurred.
- [7] The events that ultimately culminated in the dismissal of the respondents did not commence on 8 March 2021. The evidence before the commissioner established that concerns regarding the operation of the staggered-break arrangement had surfaced several days earlier.
- [8] On 2 March 2021, Mr Brian van Rensburg declined to continue operating under the staggered-break arrangement. The issue was raised with management, and discussions followed among Van Rensburg, NUMSA representatives, and members of management. Mr Langa Nguqu, a NUMSA shop steward, testified that he accompanied Van Rensburg to a meeting with Mr Sakhumzi Manyisana of the appellant's Human Resources Department.
- [9] According to Nguqu, NUMSA's position was that the arrangement was being implemented in a manner not contemplated by the collective agreement and that employees were effectively being required to perform duties extending beyond those previously performed. Nguqu testified that Manyisana undertook to raise the matter with senior management. He further testified that Van Rensburg was permitted to continue working in the manner he had adopted pending further engagement on the issue and that no disciplinary action was taken against him at that stage.
- [10] The significance of the events of 2 March 2021 lies not so much in the conduct of Van Rensburg itself, but in the manner in which management

responded thereto. During the arbitration proceedings, the commissioner relied on this evidence to conclude that the appellant had not applied discipline consistently. The appellant, in both the Labour Court and this Court, challenged the relevance and correctness of that conclusion.

- [11] In the days that followed, management maintained that employees remained obliged to provide relief during tea and meal breaks to ensure continuous production. Employees, on the other hand, regarded the issue as linked to the broader unresolved dispute concerning the implementation of the arrangement.
- [12] Matters came to a head on 8 March 2021. On that day, a meeting was convened with employees in the Banbury Department. Management reiterated that the staggered-break arrangement remained operative and that employees were required to comply with instructions issued pursuant thereto.
- [13] Following the meeting, several employees refused to comply with the instruction. Throughout, the appellant's case has been that the employees deliberately refused to obey a lawful and reasonable instruction. The respondents disputed neither the existence of the instruction nor their failure to comply therewith. Their case was directed principally at the fairness of the sanction imposed and the circumstances within which the conduct occurred.
- [14] It was common cause that the refusal to comply had operational consequences. The evidence established that production in the Banbury Department was adversely affected. The appellant regarded the conduct as a serious challenge to managerial authority and as undermining the continuous operation of the production process.
- [15] Pursuant to the events of 8 March 2021, management communicated with employees and NUMSA representatives to secure compliance. Internal communications were exchanged among senior managers regarding the operational consequences of the refusal and the disciplinary measures that would follow.

- [16] On 9 March 2021, the appellant commenced disciplinary action against employees who had refused to comply with the instruction. Proposed final written warnings were prepared and communicated to affected employees. NUMSA was informed of the appellant's intention to proceed with disciplinary action. The final written warnings recorded that the employees had deliberately and without justification refused to comply with a lawful and reasonable instruction requiring the implementation of staggered breaks to maintain continuous production. The warnings were issued during the period 9 to 10 March 2021.
- [17] The appellant's case was that, notwithstanding the issuance of the final written warnings, the employees persisted in their refusal to comply with the instruction. The appellant regarded this continued refusal as demonstrating deliberate and ongoing defiance of management authority. It therefore, viewed the misconduct particularly serious because the refusal continued despite the employees having been formally warned.
- [18] On 11 March 2021 the employees were suspended, and disciplinary proceedings were instituted. The charges ultimately preferred against them alleged gross insubordination arising from their refusal to comply with instructions to implement staggered breaks between 9 and 11 March 2021. The disciplinary enquiries culminated in findings that the employees had deliberately refused to obey lawful and reasonable instructions. In determining the sanction, reliance was placed not only on the refusal to comply with the instruction but also on the employees' persistence in the conduct whilst in receipt of final written warnings relating to substantially the same misconduct. The employees were dismissed.
- [19] NUMSA referred an unfair dismissal dispute to the CCMA on behalf of the employees. Although the employees challenged the fairness of their dismissals, the arbitration ultimately proceeded on the basis that the commissioner was required to determine both whether the misconduct had been established and, if so, whether dismissal constituted an appropriate sanction.

The arbitration award

- [20] The arbitration was conducted before Commissioner Nyondo. The commissioner rejected the employees' contention that they had not committed misconduct. Having considered the evidence presented by both parties, he concluded that the employees had deliberately refused to comply with management's instructions to implement the staggered-break arrangement. The commissioner accordingly found the employees guilty of insubordination.
- [21] The commissioner nevertheless concluded that dismissal was not an appropriate sanction. The principal reasoning underpinning that conclusion appears from paragraphs 69 to 74 and paragraphs 87 to 99 of the award. The commissioner first dealt with evidence relating to Mr Van Rensburg. In paragraph 69 of the award, he recorded the evidence of Mr Nguqu concerning the events of 2 March 2021. The commissioner noted that Mr Van Rensburg had refused to continue operating in accordance with the appellant's requirements and that the matter was raised with management. According to Nguqu, Mr Manyisana undertook to engage further on the issue, and Van Rensburg was permitted to continue working as he had been, pending further discussions.
- [22] The commissioner recorded that no disciplinary action was taken against Van Rensburg at that stage. It is apparent from the subsequent reasoning in the award that the commissioner regarded this evidence as relevant to the issue of consistency in the application of discipline.
- [23] The commissioner thereafter turned to the question of sanction. In paragraph 87 of the award, he observed that, notwithstanding the seriousness of the misconduct, the determination of an appropriate sanction required consideration of all relevant circumstances. In paragraph 88, the commissioner considered the broader context within which the misconduct occurred. He recorded that the conduct arose against the backdrop of an ongoing collective dispute concerning the implementation of the staggered-break arrangement and that the employees' refusal to comply could not be viewed entirely in isolation from that dispute.

- [24] The commissioner returned to this theme throughout the sanction analysis. He regarded the collective nature of the dispute as a factor relevant to blameworthiness and considered that management's response to the dispute formed part of the overall assessment of fairness. In paragraph 90, the commissioner turned to the final written warnings issued on 9 and 10 March 2021 and stated:

'A Final Written Warning is the penultimate sanction short of dismissal. It ought to be issued as a result of a fair process ...'

The commissioner expressed concern about the sequence of events following the issuance of the warnings and the speed with which dismissal ultimately ensued.

- [25] The commissioner observed that final written warnings were issued on 9 and 10 March 2021 and that suspensions followed shortly thereafter. He regarded the chronology as relevant to determining whether dismissal constituted a proportionate response to the misconduct. In paragraph 94, the commissioner addressed the issue of inconsistency and stated:

'The inconsistency in the application of discipline by the Respondent ...'

He thereafter relied upon what he regarded as differential treatment accorded to employees in comparable circumstances.

- [26] The commissioner considered both Van Rensburg's treatment and the appellant's response to employees who later participated in an unprotected strike. In his view, these matters demonstrated inconsistency in the application of discipline and constituted factors weighing against dismissal. Paragraph 95 of the award formed a significant component of the commissioner's reasoning. There, the commissioner recorded that employees who subsequently participated in an unprotected strike had not been subjected to the same disciplinary consequences despite the operational losses occasioned by that conduct. The commissioner regarded this as reinforcing his conclusion that dismissal was not consistently applied.

- [27] The commissioner also considered the absence of evidence concerning the destruction of the employment relationship. In paragraph 97, he stated:

‘No evidence was placed before me to demonstrate that the continued employment relationship had become intolerable.’

The commissioner regarded this as a significant consideration. In his view, the appellant had not demonstrated that continued employment was no longer feasible, notwithstanding the seriousness of the misconduct. Having considered these factors cumulatively, the commissioner concluded that dismissal was too harsh a sanction. He found the dismissals substantively unfair and ordered the reinstatement of the employees.

- [28] It is immediately apparent from the award that the commissioner did not exonerate the employees. Nor did he find that the misconduct was trivial. The award proceeded from the premise that the employees had committed acts of insubordination. The dispute before the Labour Court, and now before this Court, concerns whether the commissioner was entitled to rely on the considerations identified above in concluding that the dismissal was nevertheless unfair.

- [29] Three aspects of the commissioner's reasoning were subjected to sustained criticism by the appellant. The first concerned the commissioner's reliance on inconsistency, particularly his reliance on the treatment of Van Rensburg and on employees who later participated in an unprotected strike. The second concerned the weight attached to the collective nature of the dispute and the context within which the misconduct occurred. The third concerned the significance attributed to the final written warnings issued on 9 and 10 March 2021. These issues also formed the central focus of the review proceedings before the Labour Court.

The Labour Court judgment

- [30] Aggrieved by the arbitration award, the appellant launched review proceedings in the Labour Court in terms of s 145 of the Labour Relations

Act¹ (the LRA). The review application came before Makhura J. The review was predicated principally on the commissioner's reasoning on the sanction. The appellant did not contend that the commissioner had erred in finding the employees guilty of insubordination. Rather, it contended that the commissioner had reached an unreasonable conclusion in finding dismissal to be inappropriate.

[31] The appellant advanced several grounds of review. It contended, *inter alia*, that the commissioner had expanded the issues beyond those identified in the pre-arbitration minute; improperly entertained and relied upon inconsistency; mischaracterised the dispute as one involving collective misconduct; impermissibly considered the fairness of the final written warnings notwithstanding the absence of an unfair labour practice dispute; and failed properly to appreciate the gravity of the insubordination committed by the employees.

[32] The Labour Court approached the matter on the basis that the commissioner had accepted that the employees were guilty of insubordination and that the dispute ultimately turned on the appropriateness of dismissal as a sanction. In paragraph 29 of the judgment, Makhura J observed that the commissioner had found the employees guilty of insubordination and had thereafter considered whether that misconduct was sufficiently serious to justify dismissal. The Court held that the commissioner had undertaken the enquiry required of him under the LRA and had not ignored the seriousness of the misconduct. The Labour Court further held that the commissioner was entitled to consider the surrounding circumstances when determining whether dismissal was fair. Those circumstances included the context within which the misconduct occurred, the final written warnings issued on 9 and 10 March 2021, and the treatment of Van Rensburg and of employees who subsequently participated in an unprotected strike.

[33] In relation to the final written warnings, the Labour Court rejected the contention that the commissioner had exceeded his powers. The Court did not understand the commissioner to have set aside the warnings or to have

¹Act 66 of 1995, as amended.

determined an unfair labour practice dispute. Rather, it held that the commissioner was entitled to consider the existence and significance of the warnings in assessing the fairness of the subsequent dismissals. The Labour Court likewise rejected the appellant's complaint concerning inconsistency. It concluded that the commissioner was entitled to have regard to the treatment of other employees in assessing whether discipline had been applied consistently and fairly.

[34] As regards the collective nature of the dispute, the Labour Court held that the commissioner was entitled to consider the industrial relations context within which the misconduct occurred. The Court did not understand the commissioner to have justified the employees' refusal to comply with instructions. Rather, it considered that the commissioner had treated the existence of the dispute as one of several contextual factors relevant to the sanction. Makhura J further accepted the commissioner's finding that no evidence had been presented demonstrating that the employment relationship had broken down irretrievably or that continued employment had become intolerable.

[35] Having considered the totality of the evidence and the reasons furnished by the commissioner, the Labour Court concluded that the award fell within the band of decisions that a reasonable decision-maker could reach. The review application was accordingly dismissed, and the Labour Court subsequently refused the appellant's application for leave to appeal. Leave to appeal was thereafter granted on petition.

[36] The appeal before this Court is directed against the correctness of the Labour Court's conclusion that the commissioner's determination on sanction survived scrutiny under the review standard established by the Constitutional Court and subsequently developed in the jurisprudence of the Labour Appeal Court (the LAC) and the Supreme Court of Appeal (the SCA).

Applicable legal principles

The review standard

[37] The appeal ultimately concerns the correctness of the Labour Court's conclusion that the arbitration award withstands scrutiny under s 145 of the LRA. It is therefore convenient to commence with the applicable review principles. The proper approach to the review of arbitration awards was authoritatively articulated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*,² Navsa AJ formulated the now familiar test as follows:

‘...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...’

[38] The significance of *Sidumo* is that a review under s 145 of the LRA is concerned with reasonableness rather than correctness. A reviewing court does not enquire whether it would have reached the same conclusion as the commissioner. Nor does it ask whether the commissioner's conclusion is the best or preferable one. The enquiry is whether the outcome falls within a range of decisions reasonably open to the commissioner on the material before him or her.

[39] The review standard was further refined in *Herholdt v Nedbank Ltd (Herholdt)*,³ the SCA held:

‘...For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result....’

The SCA emphasised that not every factual or legal error committed by a commissioner renders an award reviewable. The error must be of such a nature that it distorts the enquiry or produces an unreasonable outcome.

[40] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields)*,⁴ the LAC cautioned against a fragmented evaluation of the award. In paragraphs 14 to

² (2007) 28 ILJ 2405 (CC) at para 110.

³ (2013) 34 ILJ 2795 (SCA) at para 25.

⁴ (2014) 35 ILJ 943 (LAC) at paras 14-20.

20, it stressed that the review court must consider the totality of the evidence and the overall reasonableness of the outcome, rather than isolate individual errors and assess them in isolation.

- [41] A similar approach was adopted in *Head of the Department of Education v Mofokeng and Others (Mofokeng)*.⁵ Murphy AJA explained at paragraph 33 that an error or irregularity is only reviewable if it is material in the sense that it prevents a fair trial of the issues or results in an unreasonable outcome. The focus remains on the relationship between the alleged irregularity and the result ultimately reached. These authorities make clear that the appellant bears the burden of demonstrating not merely that the commissioner erred, but that the error was material and resulted in a conclusion that falls outside the band of reasonable decisions contemplated by *Sidumo*.

The commissioner's role in determining the fairness of dismissal

- [42] The present appeal concerns the appropriateness of dismissal as a sanction. It is therefore necessary to consider the role assigned to commissioners by the LRA in determining the fairness of dismissal. Prior to the decision in *Sidumo*, the LAC in *Engen Petroleum Ltd v Commission for Conciliation, Mediation and Arbitration and Others (Engen Petroleum)*⁶ rejected the notion that commissioners are required to defer to an employer's choice of sanction. Zondo JP held, in substance, in paragraphs 64 to 68 that the LRA requires commissioners themselves to determine whether a dismissal is fair and that such determination is not reserved to the employer.

- [43] The Constitutional Court endorsed that approach in *Sidumo*⁷ at paragraph 75, where Navsa AJ held that commissioners are not required to defer to the sanction imposed by an employer. At paragraph 78, the Court explained that commissioners must consider the totality of circumstances, including the importance of the rule breached, the reason for dismissal, the harm caused by the employee's conduct, the possibility of corrective discipline, the effect of dismissal upon the employee and the employee's service record.

⁵ (2015) 36 ILJ 2802 (LAC) at para 33.

⁶ (2007) 28 ILJ 1507 (LAC) at paras 64-68.

⁷ Id fn 2 at para 75.

Furthermore, at paragraph 79, it was summed up that the commissioner must decide whether what the employer did was fair, while at paragraph 117 the Court reaffirmed that although the decision to dismiss belongs to the employer, the determination of its fairness does not.

[44] Those principles have recently been applied by this Court in *Arunachellam v Woolworths (Arunachellam)*.⁸ and in *Mondi South Africa (Pty) Ltd v National Bargaining Council for Wood and Paper Sector and Others (Mondi)*.⁹ Even where serious misconduct has been established, the commissioner is still required to undertake an independent evaluative enquiry into whether dismissal constitutes a fair sanction in all the circumstances. They likewise reaffirm that a reviewing court is not entitled to interfere merely because it would itself have imposed a different sanction.

[45] The significance of these authorities for present purposes is that the commissioner was required to make his own determination regarding the fairness of dismissal. The fact that the appellant regarded dismissal as justified does not conclude the enquiry. Equally, the commissioner's determination remains susceptible to review if it falls outside the range of reasonable outcomes contemplated by *Sidumo*.

Final written warnings and the proper statutory route

[46] One of the principal grounds advanced by the appellant concerns the commissioner's treatment of the final written warnings issued to the employees on 9 and 10 March 2021. The appellant relies heavily upon *Kock v Commission for Conciliation, Mediation and Arbitration and Others (Kock)*¹⁰ In that matter, the Labour Court considered whether an employee could challenge the fairness of a final written warning during subsequent dismissal proceedings when no unfair labour practice dispute had previously been referred.

⁸ (DA27/2024) [2026] ZALAC 28.

⁹ (DA25/24) [2026] ZALAC 20.

¹⁰ (2019) 40 ILJ 1625 (LC).

- [47] Steenkamp J held that the LRA distinguishes between dismissal disputes and disputes concerning disciplinary action short of dismissal. The latter constitute unfair labour practices as contemplated in s 186(2)(b) of the LRA and must ordinarily be pursued through the mechanisms specifically created for that purpose. At paragraphs 46 to 49, the Court held that where no unfair labour practice dispute has been referred, the validity or fairness of the warning itself is generally not open for determination in a subsequent dismissal arbitration. The arbitrator's enquiry is ordinarily confined to whether the warning existed, whether the employee was aware of it, whether it related to similar misconduct and whether it remained operative at the relevant time.
- [48] The appellant contends that the commissioner impermissibly entered terrain reserved for an unfair labour practice dispute when he considered the circumstances surrounding the issuing of the final written warnings. The respondents, on the other hand, contend that the commissioner did not determine the fairness or validity of the warnings but merely considered their significance as part of the broader enquiry into the fairness of dismissal. Whether the commissioner crossed the line identified in *Kock* is one of the issues to be determined in this appeal.

Analysis

Inconsistency

- [49] The first complaint advanced by the appellant is that the commissioner improperly relied upon inconsistency in the application of discipline. The appellant contends that inconsistency was either abandoned during the arbitration proceedings or was not properly before the commissioner and that, in any event, the comparators relied upon by the commissioner were not appropriate. The issue requires consideration of two distinct aspects of the award. The first concerns the treatment of Van Rensburg during the events of 2 March 2021. The second concerns the commissioner's reliance upon employees who later participated in an unprotected strike.
- [50] Consistency remains an important component of fairness in disciplinary matters. It has often been described as an element of disciplinary fairness

flowing from the principle that like cases should generally be treated alike. However, consistency is not an inflexible rule. As the Court observed in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,¹¹ consistency is the hallmark of progressive labour relations, but it is not a principle to be applied mechanically or without regard to the factual circumstances of individual cases.

[51] Similarly, in *NUM and Another v Amcoal Colliery t/a Arnot Colliery and Another*,¹² this Court recognised that inconsistency is not established merely because different outcomes are reached. The comparison must be a proper one and the alleged comparator must be shown to have engaged in materially similar conduct under materially similar circumstances.

[52] Turning to the first comparator, namely Van Rensburg, the commissioner accepted Nguqu's evidence that, on 2 March 2021, Van Rensburg raised objections concerning the implementation of the staggered-break arrangement, that discussions followed with management and that no disciplinary action was taken against him at that stage. The commissioner appears to have regarded this as demonstrating a different response by management to conduct, which later resulted in disciplinary action against the respondents. It was on that basis that he referred, at least in part, to inconsistency in the application of discipline.

[53] The appellant contends that the commissioner misconstrued the evidence. It submits that Van Rensburg was not guilty of the same misconduct as the respondents and that management's engagement with him on 2 March 2021 occurred before the widespread refusal to comply that arose on 8 March 2021. According to the appellant, the circumstances were materially different and incapable of supporting a finding of inconsistency.

[54] There is force in the submission that the events of 2 March 2021 were not identical to those of 8 to 11 March 2021. Van Rensburg's conduct occurred before the collective refusal that subsequently affected production and before

¹¹ (2010) 31 ILJ 452 (LC) at para 10.

¹² [2000] 8 BLLR 869 (LAC) at para 6.

management issued clear directives requiring compliance. It does not necessarily follow, however, that the commissioner acted unreasonably in considering the evidence. The question before him was not whether Van Rensburg and the respondents occupied precisely the same position. It was whether management's differing responses formed part of the broader matrix of circumstances relevant to sanction.

- [55] A commissioner assessing fairness is not confined to a rigid comparison of identical factual situations. Fairness is a value-laden enquiry. The commissioner was entitled to consider whether the manner in which management dealt with earlier manifestations of resistance to the arrangement formed part of the overall context within which the dismissals occurred. The position is in relation to the second comparator relied upon by the commissioner. At paragraph 95 of the award, the commissioner stated that although the refusal to work staggered breaks caused losses to the appellant, a subsequent unprotected strike caused even greater losses and yet no disciplinary action was taken against the employees who participated therein. He regarded that circumstance as further evidence of inconsistency.
- [56] The appellant's criticism of this reasoning is not without merit. The misconduct for which the respondents were dismissed occurred between 8 and 11 March 2021. The subsequent strike occurred thereafter and constituted a separate event. The participants in that strike were not before the commissioner on the same charges, nor was the disciplinary treatment of those employees the subject of detailed evidence.
- [57] Inconsistency requires a comparison between employees who are similarly situated. The mere fact that another group of employees may have engaged in misconduct of a different nature at a later stage does not necessarily render disciplinary action taken against the respondents inconsistent. To that extent, the commissioner appears to have attached weight to a consideration of limited relevance. The latter strike did not form part of the misconduct for which the respondents were dismissed, and absent a proper evidentiary foundation establishing a valid comparison, it provided a fragile basis upon which to draw conclusions regarding consistency.

- [58] The question, however, is not whether the commissioner erred. As *Herholdt, Gold Fields* and *Mofokeng* make clear, the enquiry is whether any such error materially distorted the outcome ultimately reached. The commissioner did not rely solely upon inconsistency. His conclusion on sanction rested upon a combination of factors which included the collective context within which the misconduct occurred, the final written warnings, the absence of evidence concerning intolerability and what he regarded as inconsistency in discipline. The significance of the inconsistency finding must therefore be assessed within the broader reasoning process reflected in the award as a whole.
- [59] It is therefore necessary to consider the second major criticism advanced by the appellant, namely the commissioner's reliance upon the collective nature of the dispute that preceded the misconduct.

The collective context and the gravity of the misconduct

- [60] The appellant's second principal complaint concerns the commissioner's reliance upon what he regarded as the collective context within which the misconduct occurred. The appellant contends that the commissioner effectively treated the existence of an unresolved collective dispute as a mitigating factor and, in doing so, materially understated the seriousness of the employees' conduct. Mr Redding submitted that the commissioner's approach is inconsistent with the scheme of the LRA. He argued that the LRA provides carefully structured mechanisms through which collective disputes may be pursued. Employees may refer disputes to conciliation and arbitration where appropriate, and where industrial action is contemplated, the LRA prescribes the circumstances in which a strike will enjoy statutory protection. According to the appellant, employees are not entitled to disregard lawful instructions merely because they are dissatisfied with working arrangements or because a collective dispute remains unresolved.
- [61] There can be little quarrel with that proposition. The existence of a dispute does not confer upon employees a licence to ignore lawful and reasonable instructions. Nor does the existence of an unresolved labour dispute render insubordination permissible. The commissioner correctly found that the

employees were guilty of misconduct and did not suggest otherwise. The question, however, is not whether the employees were justified in refusing to comply with the instruction. The commissioner found that they were not. The question is whether the commissioner was entitled to regard the context within which the misconduct occurred as relevant to the determination of the sanction.

- [62] Insubordination strikes at the heart of the employment relationship because it challenges managerial authority. In *Sylvania Metals (Pty) Ltd v Mello N.O. and Others*,¹³ this Court recognised that persistent refusal to obey lawful instructions may justify dismissal because the employment relationship depends fundamentally upon respect for lawful managerial authority.
- [63] Similarly, in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,¹⁴ this Court reiterated that insubordination is not to be viewed lightly and that the gravity of the misconduct depends upon the nature of the instruction, the circumstances in which it was issued, the extent of the defiance and the impact upon the employment relationship.
- [64] These authorities undoubtedly support the appellant's submission that the respondents' misconduct was serious. Indeed, the commissioner himself accepted that the employees had deliberately refused to comply with a lawful instruction and that production was adversely affected as a consequence. It does not, however, follow that once insubordination is established, dismissal must necessarily follow.
- [65] The authorities discussed earlier, particularly *Sidumo*, make it plain that, although deliberate insubordination constitutes serious misconduct capable of justifying dismissal, sanction remains a separate enquiry. The commissioner was therefore required to determine, independently and having regard to all the relevant circumstances, whether dismissal constituted a fair response to the misconduct established.

¹³ (JA83/2015) [2016] ZALAC 52 at paras 17-18.

¹⁴ (2015) 36 ILJ 1511 (LAC) at paras 20–21.

- [66] What emerges from paragraphs 88 and 89 of the award is that the commissioner regarded the unresolved dispute as one of several contextual factors relevant to sanction. He considered that the misconduct occurred against the backdrop of an ongoing disagreement concerning the implementation of the staggered-break arrangement and that this circumstance formed part of the overall fairness enquiry.
- [67] The appellant submits that the commissioner thereby reduced the employees' blameworthiness without any legal basis. There is some force in the criticism. The award does not clearly explain why the existence of the dispute materially diminished the seriousness of deliberate insubordination. Nor does the commissioner identify any authority supporting such a proposition.
- [68] Yet the enquiry remains one of reasonableness and not correctness. Commissioners are routinely required to consider surrounding circumstances in assessing sanction. The existence of a workplace dispute, the history of interactions between the parties, the conduct of management and the industrial relations environment may all constitute part of the factual matrix within which misconduct occurs. This is not to say that the collective dispute excused the misconduct. It plainly did not. It is rather to recognise that a commissioner tasked with determining fairness is entitled to consider the context within which the misconduct occurred when deciding whether dismissal was the appropriate response.
- [69] The recent decision of this Court in *Mondi*¹⁵ confirms that the existence of serious misconduct does not render the enquiry into sanction superfluous. The issue remains whether dismissal constituted a fair response in all the circumstances.
- [70] Viewed in isolation, the commissioner's treatment of the collective dispute may be open to criticism. However, it cannot be said that he misconceived the nature of the enquiry. The commissioner recognised the seriousness of the misconduct, accepted that the employees were guilty of insubordination and

¹⁵ Id fn 9 at para 13.

nevertheless concluded that dismissal was disproportionate when all relevant circumstances were considered.

- [71] The collective context was therefore not treated as a complete answer to the misconduct. It was one of several factors the commissioner relied upon in exercising the evaluative judgment entrusted to him under the LRA. This brings one to the issue that occupied a substantial portion of the argument before us, namely, the significance attached by the commissioner to the final written warnings issued on 9 and 10 March 2021.

The final written warnings

- [72] The appellant's third and arguably most substantial complaint concerns the commissioner's treatment of the final written warnings issued to the employees on 9 and 10 March 2021. Mr Redding submitted that the commissioner exceeded the bounds of the enquiry before him by effectively questioning the fairness of the final written warnings, notwithstanding the fact that no unfair labour practice dispute had been referred challenging those warnings. According to the appellant, the warnings remained extant and valid at all relevant times and the commissioner was obliged to accept them as such.
- [73] The submission was founded principally upon *Kock*.¹⁶ In *Kock*, the Labour Court considered whether an employee could challenge the fairness of a final written warning during a subsequent unfair dismissal arbitration when no unfair labour practice dispute had previously been referred in terms of s 186(2)(b) of the LRA.
- [74] Snyman AJ emphasised that the LRA creates distinct statutory remedies for dismissal disputes and disputes concerning disciplinary action short of dismissal. In paragraphs 46 to 49, the Court held that where no unfair labour practice dispute has been referred, the validity or fairness of the warning itself is ordinarily not open for determination in a subsequent dismissal arbitration. The Court explained that an arbitrator dealing with a dismissal dispute is

¹⁶ Id fn 10.

generally concerned with whether the warning existed, whether the employee was aware of it, whether it related to similar misconduct and whether it remained operative. The arbitrator is not ordinarily required to determine whether the warning itself was fairly issued.

- [75] Relying upon these principles, the appellant submitted that the commissioner crossed the line identified in *Kock*. Particular reliance was placed upon paragraph 90 of the award, where the commissioner stated:

‘A Final Written Warning is the penultimate sanction short of dismissal. It ought to be issued as a result of a fair process...’

The appellant contends that by embarking upon an assessment of the process that preceded the issuing of the warnings, the commissioner effectively adjudicated the fairness of disciplinary action that had never been referred for determination.

- [76] There is substance in the submission that the commissioner was not empowered to determine an unfair labour practice dispute that was never referred to him. Had the commissioner found that the warnings were invalid, unfair, or of no force and effect, serious questions would have arisen as to whether he had exceeded his jurisdiction. However, that is not what the commissioner did. Properly construed, the award does not purport to set aside the warnings. Nor does it contain a finding that the warnings were unfair or invalid. The commissioner did not direct that they be withdrawn, expunged, or disregarded. Indeed, nowhere in the award does he purport to exercise powers associated with the adjudication of an unfair labour practice dispute.

- [77] Instead, the commissioner accepted the existence of the warnings and treated them as part of the factual matrix relevant to the determination of sanction. The distinction is important. The issue before the commissioner was not whether the warnings should have been issued. The issue was whether dismissal constituted a fair sanction in circumstances where warnings were issued on 9 and 10 March 2021, suspensions followed on 11 March 2021, and dismissal ensued thereafter.

- [78] The commissioner appears to have regarded the chronology as significant. He expressed concern regarding the speed with which disciplinary escalation occurred and the extent to which the corrective purpose ordinarily associated with progressive discipline could realistically have been achieved before dismissal followed. In my view, the commissioner was entitled to consider those matters. The fairness enquiry contemplated by s 188 of the LRA is necessarily broader than a determination of whether a warning formally exists. Once the employer relies upon the existence of a warning as a factor aggravating subsequent misconduct and justifying dismissal, the significance of that warning becomes relevant to the assessment of sanction.
- [79] The appellant's own disciplinary case illustrates the point. The employees were not dismissed merely for refusing to comply with an instruction. The appellant relied heavily on the fact that they persisted in their conduct after receiving final written warnings for substantially the same misconduct. The commissioner was therefore entitled to consider the significance of those warnings as part of the disciplinary progression relied upon by the appellant, provided that he did not purport to determine their validity or fairness as a separate unfair labour practice dispute.
- [80] That is not to diminish the importance of *Kock*. The distinction drawn in that case remains valid. A commissioner may not convert an unfair dismissal arbitration into an unfair labour practice arbitration under the guise of considering sanction. The question is one of characterisation. Did the commissioner determine the fairness of the warnings themselves, or did he merely consider their significance within the broader enquiry concerning the fairness of dismissal?
- [81] Read as a whole, the award supports the latter interpretation. The commissioner did not invalidate the warnings. He considered them as one of several factors relevant to sanction. Whether one agrees with the weight he attached to that factor is a different matter. What matters for present purposes is that he did not, in my view, exceed the bounds of the dispute referred to arbitration.

[82] The appellant is therefore correct to submit that the final written warnings remained operative and were never challenged through the statutory mechanisms created for that purpose. It does not follow, however, that the commissioner was precluded from considering the circumstances surrounding those warnings when undertaking the broader fairness enquiry required by *Sidumo* and *Engen*. The final written warning must therefore be evaluated together with the commissioner's other reasons for concluding that dismissal was inappropriate. The question remains whether, viewed cumulatively, those reasons produced a result that falls outside the range of reasonable outcomes contemplated by the LRA.

Was the commissioner's conclusion on sanction reasonable?

[83] Having considered the appellant's criticisms individually, it is necessary to return to the enquiry mandated by *Sidumo*, *Herholdt*, *Gold Fields* and *Mofokeng*. The question is not whether every aspect of the commissioner's reasoning was beyond criticism. Nor is it a question of whether this Court would itself have imposed dismissal. The question is whether the commissioner's ultimate conclusion falls outside the band of decisions reasonably available to a decision-maker entrusted with determining the fairness of dismissal.

[84] The appellant's submissions correctly emphasise the seriousness of the misconduct. The employees deliberately refused to comply with a lawful and reasonable instruction. The refusal affected production and persisted notwithstanding repeated efforts by management to secure compliance. The commissioner expressly accepted those facts and correctly found the employees guilty of insubordination. The appellant is also correct in contending that portions of the commissioner's reasoning are open to criticism.

[85] In particular, the commissioner's reliance on paragraph 95 of the award upon the treatment of employees who later participated in an unprotected strike is problematic. The strike occurred after the misconduct for which the respondents were dismissed and involved a different factual matrix. The

evidential basis for treating those employees as proper comparators was limited. To that extent, the commissioner attached weight to a consideration of doubtful relevance.

[86] Equally, the commissioner's treatment of the collective dispute is not entirely free from difficulty. Whilst the existence of an unresolved workplace dispute formed part of the factual context within which the misconduct occurred, the award does not fully explain why that circumstance materially reduced the seriousness of deliberate insubordination. The appellant's criticism in this regard is not without substance. Yet neither of those observations concludes the review enquiry.

[87] As was explained in *Herholdt* and *Mofokeng*, a review is not directed at the correctness of every step in the reasoning process. Errors, misconceptions and irregularities warrant intervention only where they are material to the result and produce an outcome that no reasonable decision-maker could reach. The award must therefore be considered as a whole.

[88] The commissioner did not ignore the seriousness of the misconduct. Nor did he conclude that the employees were justified in refusing to comply with the instruction. On the contrary, he found them guilty of insubordination. The commissioner nevertheless concluded that dismissal was too harsh a sanction when all relevant circumstances were considered. Amongst those circumstances were the unresolved dispute concerning the implementation of the staggered-break arrangement, the manner in which earlier resistance to that arrangement had been addressed, the final written warnings issued immediately prior to dismissal and the absence of evidence demonstrating that continued employment had become intolerable.

[89] The appellant criticised the commissioner's reliance upon the absence of evidence concerning the breakdown of the employment relationship. It is true that proof of intolerability is not a jurisdictional prerequisite for dismissal based on insubordination. However, the existence or absence of evidence concerning the breakdown of trust remains a relevant consideration in

determining the appropriateness of dismissal. It was therefore a factor the commissioner was entitled to take into account.

- [90] Of particular significance is that the commissioner was engaged in the evaluative exercise entrusted to him by the LRA. The enquiry before this Court is therefore not whether dismissal was the sanction this Court would itself have imposed, but whether the commissioner's conclusion falls outside the range of reasonable outcomes open to a commissioner performing that statutory function.
- [91] The appellant's submissions, although forcefully advanced, ultimately invite this Court to substitute its own assessment of sanction for that of the commissioner. That is not the function of a review court. A commissioner may reasonably conclude that dismissal is inappropriate even where the misconduct is serious. The existence of a different outcome that may equally have been reasonable does not render the commissioner's conclusion reviewable.
- [92] The recent authorities of this Court reinforce that principle. In *Arunachellam*,¹⁷ this Court emphasised the centrality of the sanction enquiry in dismissal disputes. In *Mondi*,¹⁸ the LAC reiterated that a finding of misconduct does not automatically dictate dismissal and that commissioners remain required to determine whether dismissal constitutes a fair response in the circumstances.
- [93] Once it is accepted that the commissioner was entitled to consider the broader context of the dispute, the significance of the disciplinary progression and the evidence concerning the employment relationship, it cannot be said that his conclusion was disconnected from the evidence before him. Whether another commissioner may have imposed dismissal is not the issue. The issue is whether the conclusion reached falls outside the range of decisions reasonably open to a commissioner performing the task assigned by the LRA. In my view, it does not.

¹⁷ Id fn 6.

¹⁸ Id fn 7.

[94] The commissioner may have overstated the significance of certain considerations, particularly the treatment of employees involved in the later strike. However, those considerations did not constitute the sole foundation of the award. They formed part of a broader evaluative exercise directed at determining the fairness of dismissal. Viewed holistically, and having regard to the totality of the evidence and the reasons furnished by the commissioner, I am unable to conclude that the award falls outside the band of reasonable outcomes contemplated by *Sidumo*. The Labour Court, therefore, cannot be faulted for concluding that the appellant failed to establish a reviewable irregularity.

Subsequent closure of the appellant's manufacturing operations

[95] During argument, the parties informed the court that the appellant ceased its South African manufacturing operations during or about August 2025. The issue arose in the context of the practical consequences of the reinstatement order granted by the commissioner. Mr Grogan submitted that, should the appeal fail, the employees ought not to be deprived of the fruits of the award merely because the appellant subsequently ceased operations. Mr Redding, on the other hand, submitted that the consequences of the closure were not matters properly before this Court and that no application had been brought to adduce further evidence or vary the relief granted.

[96] The closure of the appellant's manufacturing operations occurred long after the award and the review proceedings. It played no role in the commissioner's determination and is irrelevant to the merits of the appeal. Furthermore, the legal consequences of the closure, including any questions concerning the implementation of the reinstatement order, impossibility of performance, severance arrangements, or any entitlement to compensation, do not arise on the present record and were not the subject of any formal application before this Court. It is therefore unnecessary and inappropriate to express any view on those issues. They remain matters to be determined, if necessary, in appropriate proceedings.

Costs

[97] Section 162 of the LRA confers a broad discretion on this Court to make orders for costs in accordance with the requirements of law and fairness. In *Zungu v Premier of the Province of KwaZulu-Natal and Others*,¹⁹ the Constitutional Court reaffirmed that there is no general rule that costs follow the result in labour matters and emphasised that costs must be determined in accordance with the requirements of law and fairness. The court cautioned against making adverse costs orders that may discourage parties from vindicating labour rights. Although the appeal has not succeeded, the issues raised were neither frivolous nor vexatious. The appeal concerned the proper limits of a commissioner's sanction enquiry and raised important questions concerning inconsistency, collective misconduct and the treatment of final written warnings. In those circumstances, considerations of fairness dictate that no order as to costs should be made.

[98] In the result, the following order is made:

Order

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

MBS Masipa

Acting Judge of the Labour Appeal Court of South Africa

Tokota AJA and Moshwana AJA concur.

APPEARANCES:

¹⁹ 2018 39 ILJ 523 (CC) paras 23- 24.

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LABOUR APPEAL COURT