

**IN THE LABOUR COURT IN JOHANNESBURG**

**CASE NUMBER: JR1617/22**

In the matter between:

**SERITI POWER (PTY) LTD**

**APPLICANT**

and

**CCMA**

**FIRST RESPONDENT**

**MNISI VM N.O**

**SECOND RESPONDENT**

**NATIONAL UNION OF MINEWORKERS**

**THIRD RESPONDENT**

**NCONGWANE, DANIEL**

**FOURTH RESPONDENT**

**Heard: 27 February 2024**

**Delivered: 16 April 2024**

**Judgment**

**Norton AJ**

**Introduction**

1. The Applicant (Seriti Power), a mining company, seeks to review and set aside an arbitration award made by the Second Respondent, commissioner Mnisi in favour of the Fourth Respondent, Mr Daniel Ncongwane in June 2022.

2. The Applicant dismissed Mr Ncongwane in May 2021 for misconduct after he was found guilty at an internal enquiry of dishonesty and none compliance with the Mine's procurement rules and procedures. The charges read as follows:

*“On numerous occasions the defendant signed for direct delivery of goods from a vendor who is not registered to provide such goods. Furthermore, there exists no proof that the goods were delivered at site. Such conduct is in breach of the trust relationship.*

*The defendant was in breach of instruction and the mine standards on an occasion where direct goods were delivered to him without being received by the warehouse and then distributed from there.”*

3. At the heart of the charges were the allegation that Mr Ncongwane bypassed standard procurement rules and procedures, in that he ordered goods, which the mine paid for, which were not delivered.

4. Mr Ncongwane referred an unfair dismissal dispute to the CCMA, which proceeded to arbitration. At arbitration the Applicant led two witnesses Ms Cindy Schoenwinkel, the Warehouse Leader and Mr Kabelo Lekalakala, a Human Resources Specialist. Mr Ncongwane testified and called three witnesses, Mr Derek Shube, a Shift Boss at Khutala Mine; Mr Jan Maseko, a planner (an ex employee dismissed for similar misconduct) and Mr Patrick Mncina, the warehouse supervisor at Khutala Mine.

5. The commissioner found that the dismissal was substantively unfair and ordered reinstatement with full back pay in the amount of R817 731.96. Mr Ncongwane was to report for duty on 11 July 2022. The mine has paid 24 months salary (R1 635 463.92) into their attorneys trust account as security, pending the outcome of this review as contemplated in section 145(8)(a) of the LRA.<sup>1</sup>

### **The review challenge**

6. The mine states in the founding affidavit that,  
*“the Commissioner in concluding that the dismissal was substantively unfair committed gross irregularities in that he did not evaluate and determine the evidence properly, failed to apply his mind to the evidence before him in determining the*

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<sup>1</sup> Notice of 8 September 2022.

*issues in dispute and failed to have regard to legal principles relating to the issue of appropriateness of sanction, which resulted in the Commissioner arriving at an award no reasonable commission could have arrived at on the evidence before him.”<sup>2</sup>*

7. The mine refers particularly to the following grounds:

7.1. The commissioner erred by assessing credibility and not assessing the probabilities.<sup>3</sup>

7.2. The commissioner ignored material evidence.<sup>4</sup>

7.3. The commissioner failed to consider whether or not Ncongwane’s conduct amounted to dishonesty.<sup>5</sup>

8. Those grounds arise from the analysis towards the end of the arbitration award in which the commissioner concludes:

8.1. That the mine failed to quantify the occasions Mr Ncongwane signed for the direct delivery of goods from a vendor who was not registered to provide such goods<sup>6</sup>

8.2. The evidence tendered by Ms Schoenwinkel was inconsistent and she contradicted herself.<sup>7</sup>

8.3. The mine did not demonstrate that Mr Ngongwane had contravened a workplace rule.<sup>8</sup>

### **The evidence**

9. Schoenwinkel testified about the mine’s standard operating procedure for receiving goods. Goods ordered were to be delivered to the warehouse. Thereafter the goods were distributed to the various operations.

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<sup>2</sup> Paragraph 41

<sup>3</sup> Paragraph 43

<sup>4</sup> Paragraph 44 of the Founding Affidavit

<sup>5</sup> Paragraph 50 of the Founding Affidavit

<sup>6</sup> Paragraph 62

<sup>7</sup> Paragraph 63

<sup>8</sup> Paragraph 67

10. There was an exception where goods could be delivered directly to workshops and that was in situations in which special transport or material handling was required. Exceptions required pre arrangement and approval by the warehouse.

11. Direct deliveries to end users were not allowed unless there was a breakdown and the user was not close to the warehouse. The mine issued a memorandum to employees on 7 February 2020 emphasising these points. The purpose of the procedure was cost control and to maintain ethical relationships with suppliers. The memorandum read, “...*It has been decided ...to control direct purchases and contractor utilisation to the entire operation in an attempt to reduce cost expenditure.*”<sup>9</sup>

12. Mr Schoenwinkel commented that “*There was a pattern with Vuka Vusi that (a vendor) their goods did not come through the warehouse at all...it was always the same people ordering and the same people receiving.*” She then referred to Mr Ncongwane and Mr Maseko in this regard.<sup>10</sup>

13. On 18 June 2020 Mr Ncongwane signed a delivery note for four bleeding tools for R39 100.00 from a vendor called Vuka Vusi Trading. He also signed a delivery note for a non flameproof pump for R51 750.00 from the same vendor. There was no record (in terms of access control) that Vuka Vusi had entered the mine’s premises that day to deliver these items.<sup>11</sup>

14. Ms Schoenwinkel explained that Mr Ncongwane had breached the SOP rules in that he took delivery of the items (assuming they were delivered) when they should have been delivered to the warehouse, and he did not seek prior approval to take delivery of the goods.

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<sup>9</sup> Bundle pg 178

<sup>10</sup> Transcript 70 and 71

<sup>11</sup> Bundle pg 176

15. It emerged that Mr Ncongwane had ordered, and his colleagues took delivery of (or arguably purported to take delivery of) two brake valve banks, two hydraulic control valves and one aluminium pump. This conduct too contravened the mine's standard operating procedures.

16. At the start of the arbitration on 17 March 2021 Mr Ncongwane proposed that the parties conduct an inspection in loco at the mine to show that the goods were on the mine. The employer agreed. The inspection revealed the following anomalies:

16.1. There was no presence of the four nett bleeding tools ordered by Mr Ncongwane and allegedly delivered.<sup>12</sup>

16.2. The brake valves ordered by Mr Ncongwane, and received by Mr Maseko allegedly delivered by Vuka Vusi were not present.

16.3. Only one of four electric joint boxes ordered by Mr Ncongwane and allegedly delivered by Vuka Vusi to Maseko in May 2020 was present. Ms Schoenwinkel later traced the serial number which showed that the date of manufacture was December 2020, at least 6 months after the alleged delivery of the items.<sup>13</sup> (Inference being that what was shown to the employer in the inspection in loco was designed to deceive)

17. The employer paid R45 000 for the pump, yet a google search showed the value to be R3 500.00.

18. Apart from the type of pump and the value of the pump, Mr Ncongwane did not present any reasonable evidence to explain the discrepancies and did not put any versions to Ms Schoenwinkel on the matter in cross examination.

### **Discussion and analysis**

19. The Commissioner gave little weight to this uncontroverted evidence that demonstrated that the employer had proved on a balance of probability that the goods ordered (bleedings tools, brake valves and electric joint boxes), or signed for

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<sup>12</sup> Pg 74 and 201

<sup>13</sup> Transcript pg 80

by Mr Ncongwane were not delivered; that he had breached mine standard operating procedures, and had been dishonest.

20. The test for review is set out in section 145 (2) of the LRA – an arbitration award may be set aside if the commissioner committed misconduct, a gross irregularity or exceeded his or her powers, or if the award was irregularly obtained. The test is infused with the standard of reasonableness, established by the Constitutional Court in *Sidumo and another v Rustenburg Platinum Mines*.<sup>14</sup> The standard is expressed in the negative, “*Is the decision reached by the commissioner one that a reasonable decision maker could not reach?*”

21. Over the years, various courts have espoused related principles, and one apposite to the case before us is *Herholdt v Nedbank*.<sup>15</sup> In that case the Supreme Court of Appeal stated

*“A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii) the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside but are only a consequence if their effect is to render the outcome unreasonable.”*

22. The conclusions drawn by the Commissioner were with respect illogical, irrational and unreasonable when considering the evidence that Mr Ncongwane ordered items from Vuka Vusi, a vendor not in the business of those supplies, and that it was more probable than not (noting that they were missing at the inspection in loco) that they were not delivered. The mine had demonstrated the number of times that Mr Ncongwane had ordered goods from Vuka Vusi and that he had breached

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<sup>14</sup> CCT 85 / 06

<sup>15</sup> (2013) 34 ILJ 2795 (SCA)

the standard operating procedures by ordering directly and bypassing the warehouse checks and balances. He had clearly breached the workplace rules on procurement. Schoenwinkel's evidence was clear and supported by documents such as invoices, policies and access control registers. Akin to the SCA's analysis of *Heroldt*, the Commissioner had arrived at "*unreasonable result*."

23. I am persuaded that the Commissioner committed a reviewable defect as contemplated in section 145 of the Labour Relations Act, 1995 in that he failed to apply his mind to the evidence before him, and draw the obvious conclusions. This is a classic award in which the Commissioner's analysis and order falls outside of the *Sidumo* spectrum of reasonableness.

24. In the circumstance I make the following order:

**Order**

25. The arbitration award under case number MPEM 3049/21 is reviewed and set aside.

26. The dismissal of Mr Ncongwane was fair.

27. No order as to cost.

D Norton  
Acting Judge of the Labour Court

**Appearances:**

For the Applicant:	MG Maesto Shepstone & Wylie Attorneys
For the Fourth Respondent:	Adv L Phaladi