THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 1895/21

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION WORKERS UNION ("AMCU") OBO MATEBELE AND 3 OTHERS **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

MASHEGOANE, M.A. *N.O.* **Second Respondent**

IPP MINING AND MATERIALS HANDLING **Third Respondent**

Heard: **8 May 2025**
Delivered: **16 May 2025**

JUDGMENT

BOTES, AJ

Introduction

[1] Do employees have to refer their unfair dismissal disputes to the Labour Court where they were dismissed for misconduct committed whilst participating in an unprotected strike, or does the CCMA have jurisdiction to arbitrate such a dispute? Should an employer show why it took action against employees committing one form of misconduct whilst opting against taking steps against other employees who contemporaneously committed a different type of misconduct? These novel grounds, and others more frequently traversed during review proceedings, were debated and considered in the context of this application.

[2] I am indebted to the legal representatives of both parties for their written and oral submissions.

Background

[3] The employer is contracted to provide excavation services to Wescoal Mining after replacing a previous service provider in or about 2019 following a violent strike.[1]

[4] The employees embarked on unprotected industrial action on 16 October 2020[2] following their dissatisfaction with the dismissal of a colleague and shop steward.[3] The employer and trade union concluded a collective agreement on 20 December 2020 wherein they agreed, amongst others, that the employees will return to work and that the dismissed employees will be allowed to appeal their disciplinary hearing outcome.

[5] On 15 January 2021, following an initial disciplinary and subsequent appeal hearing, the employer dismissed four employees after concluding that they had committed misconduct during an unprotected strike. The dismissed employees are

[1] Record of proceedings, pages 15-22.
[2] Pre-arbitration minute, Pleadings, page 15. See also pages 11, 21 and 81 of the Record of proceedings, and paragraph 56 of the arbitration award.
[3] Pleadings, Founding Affidavit, page 8.

Gabriel Mashilo, Sifiso Sibanyoni, Esau Mathabile and Thomas Masakona. They were also trade union representatives of the applicant trade union who brought this application on their behalf.

[6] A large group of employees participated in a work stoppage, and access and egress to the employer's premises were blocked by the striking employees.

[7] The employer levelled allegations of misconduct against the four applicant employees. It framed their misconduct as *"sabotage, interference with security personnel, and obliteration of evidence"*.[4] The notice of allegations further clarified the conduct as follows:

> 'In that you closed the gate and blocked trucks from entering and exiting the mine, effectively obstructing the operation of the company.
> You undermined and interfered with Security personnel when they wanted to carry on with their access duties at the gates.
> You threatened and bullied Johannes Van (sic) Zyl into erasing video evidence of your unwanted actions from his phone. He erased evidence out of fear.'

[8] The allegations were identical against all four employees, save for the fact that the employer added an additional allegation against Messrs Mashilo and Masakona that *"[y]ou continued with your bullying tactics against Hennie Van (sic) Coller who stood his ground"*.

Jurisdiction of the CCMA in Unprotected Strike Disputes

[9] The Applicant argued that the CCMA lacked jurisdiction to determine the dismissal dispute on account of the Commissioner concluding *"… that there was 'unprotected industrial action"*[5]. The argument put forward was that section 191(5)(b)(ii) of the Labour Relations Act[6] (LRA) requires all disputes regarding the fairness of a dismissal relating to unprotected industrial action to be referred to the

[4] Record of proceedings, page 59.
[5] Applicant's heads of argument, page 9; Arbitration award.
[6] Act 66 of 1995, as amended.

Labour Court for adjudication. This means, by implication, that the CCMA lacks jurisdiction to determine a dismissal relating to unprotected industrial action.

[10] It is apposite to consider the appropriate interpretation of section 191(5).

'(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved—

…

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV…" [emphasis added]

[11] In *Meyer v WC Butler t/a Wack-Em*[7] this court, per Wagley J (as he then was), confirmed that the CCMA lacks jurisdiction to arbitrate a dispute relating to the dismissal of an employee due to the employer's operational requirements unless the parties agreed that the commissioner may arbitrate the dispute.[8] Whilst the 2002 amendments to the LRA saw the introduction of section 191(12), the judgment still holds true in respect of the jurisdiction of the CCMA in respect of disputes listed in section 191(5)(b). The CCMA does not have jurisdiction to arbitrate a dispute that ought to be referred to the Labour Court for adjudication unless the CCMA gains such jurisdiction through other valid means, such as an agreement between the parties in terms of section 141(1).[9]

[12] The use of the word "may" in section 191(5)(b) does *not* indicate that an employee has the option to elect to refer the dispute to the Labour Court, alternatively to the CCMA, in respect of claims in section 191(5)(b)(i)-(iv). It merely

[7] [2000] 5 BLLR 600 (LC).
[8] The judgment dealt with section 191 prior to the addition of section 191(12) in 2002.
[9] Section 141(1) states: *"If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if a party to the dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication and, instead, all the parties agree in writing to arbitration under the auspices of the Commission"*.

means that the employee is not compelled to persist with the dispute after conciliation but should the employee opt to continue to prosecute the dispute, the next step would be to refer that dispute to the Labour Court. The Labour Court has exclusive jurisdiction over those categories of claims in section 191(5)(b) unless the CCMA is otherwise empowered (by a different statutory provision) to arbitrate the dispute, as would be the case where the parties agree to confer jurisdiction on the CCMA for this purpose in terms of section 141(1).

[13] However, one should also consider the wording of the limitation placed on the CCMA to arbitrate dismissals in section 191(5)(b) when contemplating the Commission's jurisdiction. Section 191(5)(b)(iii) requires the Labour Court to determine a dispute referred to it by an employee where the employee alleges the dismissal relates to the employee's participation in a strike that does not comply with Chapter IV.

[14] The CCMA is bound by the framing of the dispute by the employer or the employee (*Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union)*[10]. The tribunal has to determine the true nature of the dispute,[11] even where an employee claims that the reason for their dismissal is their participation in a strike not in compliance with Chapter IV. It considers the substance of the dispute and not at the form in which it is presented.[12]

[15] In this case, the employees *did not* claim that their dismissal was due to their participation in such an unprotected strike. Their position argued at the CCMA (and in this court) is that they were unfairly dismissed for misconduct which they deny having committed.

[16] Section 191(5)(b) does not find application unless the reason for the dismissal is one listed in subsections (i) – (iv). Where a ground listed in subsections (i)-(iv) is

---

[10] (1997) 18 *ILJ* 671 (LAC). See also *Wardlaw v Supreme Moulding (Pty) Ltd*) [2007] 6 BLLR 487 (LAC); (2007) 28 ILJ 1042 (LAC) at paras 23-24.
[11] *Coin Security Group (Pty) Ltd v Adams & others (Coin Security Group)* (2000) 21 *ILJ* 924 (LAC); [2000] 4 BLLR 371 (LAC); *National Union of Metalworkers of SA & others v Bader Bop SA (Pty) Ltd & another* (2003) 24 *ILJ* 305 (CC); [2003] 2 BLLR 103 (CC) at para 52.
[12] *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others* (1998) 19 *ILJ* 260 (LAC); [1998] ZALAC 23.

present in the factual matrix, the ground must be a reason for the dismissal and not merely peripherally connected with the dispute. In the context of the facts of this case, the mere fact that the employees participated in unprotected industrial action is insufficient to trigger the requirement that the Labour Court adjudicate the dispute. The court will only assume such jurisdiction, and the CCMA only forfeit its own, where the ground is causally connected to the dismissal.

[17] Where there is a dispute about the reason for the dismissal, the test for determining the true reason is an objective one. Referring, with approval, to the judgment in that matter by the Labour Court, the Constitutional Court stated as follows in *National Union of Metalworkers of South Africa and others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and another*[13], albeit in the context of disputes about the reason for a dismissal in terms of section 187(1):

> 'Determining the reason for a dismissal is a question of fact and the enquiry into the reasons for the dismissal is an objective one [footnote omitted]. One of the ways this can be done is to apply the test in *Afrox.* [footnote: While it is called a "causation" test, its essential utility is in determining the proximate or dominant factor in an event. This is borne out by the facts of each case, such as in the present one, when there may be multiple competing reasons for a dismissal. The determination by a court as to the "true" or "dominant" reason strikes the balance between outlawing all operational dismissals in the context of collective bargaining and allowing all dismissals provided, however, that an employer proves that they were for operational requirements].'

[18] In my mind, this test finds equal application in respect of section 191(5) and is aligned with the approach endorsed in *Coin Security Group* above. The true or dominant reason for the dismissal must have been the participation in the unprotected industrial action for the limitation in section 191(5)(iii) to find application. It could not have been the intention of the legislature to allow parties to unfair dismissal disputes to select their preferred forum to determine a dispute, provided they frame their claim in a particular way. Sound policy reasons underscore the

[13] [2021] 1 BLLR 1 (CC); [2021] 1 BLLR 1 (CC) at para 70.

legislative requirement for different disputes to be resolved at the CCMA versus Labour Court, and *vice versa*.

[19] It seems clear to me that the participation in the unprotected industrial action by the four applicant employees was not the reason for their dismissal. The employees' claim that they were unfairly selected for disciplinary action and dispute that they committed misconduct, but even they have framed their dismissal as one relating to misconduct, not as a dismissal for participating in unprotected industrial action. There seems little doubt that, rightly or wrongly, the employer dismissed the employees as a result of its view of their further conduct relating to the strike– sabotage, interference with security personnel and destruction of evidence, and not for their conduct of participation in the unprotected strike.

[20] I am thus unable to agree with Mr Cook that the CCMA lacked jurisdiction to arbitrate the dispute on the basis that the employees ought to have referred the dispute to this court for adjudication. I find that the CCMA was indeed properly clothed with jurisdiction to arbitrate the unfair dismissal dispute. To their credit, both counsel also agreed that the CCMA would indeed be the appropriate forum for the resolution of the dispute should I find that the award stands to be reviewed and set aside. I return to this point later.

Consistency

[21] The four applicant employees claim that the employer acted inconsistently by singling them out for disciplinary action and dismissing them. These employees feel that they were targeted because of their leadership role within the trade union or amongst the workers.

[22] A large group of employees were involved in the unprotected industrial action. In the normal course, such participation – on its own – constitutes misconduct. Employees may not intentionally or negligently breach duties owed to the employer, including the duty to tender service, refrain from conduct that undermines the relationship of trust and confidence the employer should be able to place in the employee, further the employer's business interests, to name but a few.

[23] The peaceful participation in the work stoppage by the majority of the participants does not detract from the wrongfulness of their conduct. In addition, the evidence before the commissioner included that there were other employees involved in the moving of the trucks, for instance. On the face of it, it seems incontrovertible that misconduct was committed by more people than the four employees.

[24] The employer bears the onus of proving the fairness of the dismissal of the employees. The parties did not further narrow substantive fairness during the pre-arbitration conference.

[25] The employer argued that the commissioner cannot be faulted for failing to consider consistency as a factor, as the trade union did not challenge this aspect during the arbitration. Adv. Cook pointed to pages 132 (paragraph 33) and 135 (paragraph 74)[14] in support of his contention that the trade union did indeed challenge consistency during the arbitration. I agree that consistency was indeed an aspect in dispute before the commissioner.

[26] The legislature provided the following guidance on the consistent application of dismissal as a sanction in Schedule 8, Code of Good Practice: Dismissal:

> '3(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[27] Simple justice demands that employees are treated equally, subject to the factors impacting each employee and the unique circumstances of each case, matter or incident. The factors impacting on the conduct of employees differ from person to person, and from situation to situation. Those factors should validly be considered by the employer in determining (1) whether to take action against an employee, and (2) the extent of the action taken. Parity should primarily lay in the decision-maker's

[14] Record of proceedings, Applicants' closing submissions.

consideration of the factors relevant to the employees and the conduct. Where two employees are involved in an incident, the employer is obliged to consider the conduct of both employees, and then treat the employees equitably with due consideration of their circumstances.

[28] Stated differently, it is not unfair or inconsistent for an employer to decide against taking disciplinary action against, by way of example, both employees who reported late for duty on the same day. The employer must consider the fact that they both breached a workplace rule or duty owed to the employer, but instead of going through a rote process, taking the same action and ensuring the same outcome against both of them, the employer must investigate the matter. It would not be inconsistent or unfair to excuse the one employee from disciplinary action whilst instituting disciplinary measures against the other employee under circumstances where the one employee has an acceptable reason or defence to the breach of the workplace rule but the other employee does not.

[29] Employee A could have been involved in a motor vehicle accident on the way to work, immediately notified the employer of their inability to report for duty on time, and arranged for a colleague to report for duty in their stead. Employee B, on the other hand, indicated that they reported late as they forgot to set their alarm and overslept. In this scenario, Employee A's breach of the workplace rule does not constitute misconduct as the breach was not due to their fault – there is an absence of intention or negligence. Employee B acted negligently in not setting their alarm. A reasonable employee in their position would have foreseen that failing to set an alarm could cause them to oversleep and not be able to report for duty on time, and would thus have taken precautions to ensure they do not forget or, should they forget, that they take steps to limit the adverse impact or harm. The mere fact that both committed the same act (reporting late for duty) does not mean that it is unfair or inconsistent for the employer to take action against only one of them, or to differentiate in the action or outcome in respect of the two employees.

[30] The employer should also consider all material relevant factors in determining corrective measures implemented, if any, in respect of the employees. An employee who repeatedly infringes cannot expect to be treated the same as an employee with

an unblemished record who transgresses for the first time. Employees with long, clean records can legitimately expect that their employer will place value on their distinguished service when deciding on the sanction applicable to their misconduct. Consistency can never mean that all employees who breached a workplace rule must (1) all be subjected to disciplinary action, and (2) receive the same outcome or be subjected to identical consequence management.

[31] I am in respectful agreement with the line of authority that cautions against elevating consistency to an absolute standard or the touchstone of fairness. Consistency should satisfy our sense of relative fairness. Arbitrary, capricious or irrational decision-making is the antithesis of consistency, and disciplinary action cannot contain any such element. However, consistency should never mean *"because we dismissed Joe a year ago for repeated late-coming, we now have to dismiss all other employees for repeated late-coming"*. Instead, it should be interpreted to mean that the employer will treat all people who repeatedly come late for work in the same way that it treated Joe a year ago, subject to consideration of the unique factors of every employee, the circumstances of the incident and the impact or effect of the conduct.

[32] Turning to the facts of this case, I have appreciation for the concern of the applicant employees that the commissioner failed to have regard for their complaint that the employer selectively took action against them, where this was an issue in dispute before the commissioner. It may well be that the employer has valid reasons for not taking action against all employees who participated in the work stoppage, or even committed other or related acts of misconduct. In the context of managing complex employee relations, an employer should not readily be faulted for making valid business decisions to minimise disruption, manage labour peace or otherwise achieve a valid and lawful business objective. Had the commissioner indicated in his award that he had, for instance, had regard for the collective agreement the employer reached with the trade union on 20 December 2020, it would have allowed the parties to appreciate that he considered the relevant factors that could support the employer's decision to take action against some but not all employees.

[33] The majority decision of the Appellate Division (as it then was) in *National Union of Metalworkers of SA & others v Henred Fruehauf Trailers (Pty) Ltd*[15] confirms the difficulty with selectively taking disciplinary action against only some of the employees who committed misconduct.

> 'It must borne in mind that the 44 employees were not alone. They comprised only about 2% of the total workforce of some 2 000 all of whom participated in the go-slow strike. They were engaged in one shop in one factory belonging to a company whose operations were countrywide. The 44 employees were the only employees dismissed: the others, whose conduct was equally reprehensible, were left undisturbed in their positions. The only thing which set the 44 employees apart from the remaining 98% of employees was the fact that they were the victims of an unfair labour practice. But they became the whipping boys.'[16]

[34] The minority decision provides a salutary reminder of various practical difficulties besieging employers faced with misconduct committed by groups of employees. I am in respectful agreement that a court or tribunal should consider all relevant evidence when determining whether inconsistent application of workplace discipline constitutes unfairness. Mere differences in treatment or outcome do not *per se* amount to unfairness.

> 'It seems to me, however, that the extent of the arbitrariness, and the motives which led to the issuing of that ultimatum, are factors to be taken into account when assessing the degree of the respondent's blameworthiness. They are hence factors to be considered in deciding what consequential relief is appropriate.
>
> This was not a case in which an employer was bent on victimizing a particular employee or a group of employees whilst others were guilty of the same misconduct. It is true that the respondent had little doubt that all of its employees were engaged in the go-slow, but proof of that was another matter.'

[15] (1994) 15 ILJ 1257 (A) at 1263H.
[16] At 1272C.

[35] An employer is required to act fairly in meting out discipline, and does so where it considers the totality of circumstances and appropriately exercises discretion in determining against whom to act, and then applies the principles of determining appropriate sanction in attaching consequences to misconduct. This could see the employer being able to evidence sound reasons for taking action against only some employees who committed misconduct, but not others; for taking disciplinary action against employees who committed specific acts of misconduct but not against others who committed different acts of misconduct, even if done contemporaneously; or for differentiating in the consequences attached to the misconduct.

[36] Due to the difficulties occasioned by the incomplete record, I am unable to determine on the facts of this case the merits of the submission that the employer's decision to take disciplinary action against the four applicant employees only constitutes inconsistency that a reasonable commissioner would have considered to vitiate the fairness of the dismissal.

Assessment of the evidence

[37] Both the trade union and employer argued the importance and relevance of the decision in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others*[17] *(Stellenbosch Farmers' Winery or SFW)* when considering resolving factual disputes. In a twist of irony worthy of an Alanis Morissette song, at the CCMA, it was the employer that implored the commissioner to follow the guidelines established by the SCA in that decision,[18] whilst in this review application, the trade union passionately argued that this court should set aside the award as the commissioner failed to follow the SCA's guidance in the same case.

[38] The SCA recorded the test for resolving factual disputes in respect of irreconcilable versions as follows:

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a

[17] 2003 (1) SA 11 (SCA); [2002] ZASCA 98 at para 5.
[18] Employer's closing arguments, Record of proceedings, page 139.

conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'[19]

[39] Adv. Cook requested me to find that the award should be set aside as it does not evidence the commissioner's approach to considering the evidence in line with *SFW.* Ms Lancaster, on the other hand, strongly urged me to resist the temptation to set aside the award based on any perceived lack of elegance or craftsmanship. I am in respectful agreement with her sentiment – the test cannot be whether the award should rightfully hang in the Louvre or be worthy of a Pulitzer.

[40] Adv. Cook argued that the award evidences the absence of reasons by the commissioner, with no indication that he resolved the factual disputes along the lines suggested in *SFW.* Ms Lancaster implored me to view the commissioner's reflections in paragraphs 56-61 of the award as adequate evidence of his evaluation of the evidence (credibility, reliability and probabilities).

[41] The commissioner's recordal in paragraphs 56-61 is as follows:

41.1 The four employees denied the allegations against them, but could not (clearly) explain their presence at the gate.

41.2 He found that it was common cause that:

41.2.1 The trucks could not enter or exit the mines (due to the industrial action);

41.2.2 The security officer was forced to delete videos and photos in the presence of the four applicant employees;

41.2.3 The four employees were shop stewards, *"yet they failed to assist the employer in identifying the culprits"*;

41.3 "Despite" being identified on the scene, the four employees refused to tell the employer the identity of the unidentified person. Some of the witnesses (presumably applicant employees) *"said boldly that that they would not disclose the name of the person because he would be dismissed, not realising that their conduct constitutes the so-called derivative misconduct, meaning*

[19] *Stellenbosch Farmers Winery* above at para 5.

that the employees who failed to assist the employer to identify the culprit, that person would is equally guilty of the misconduct (sic)";

41.4 The commissioner appears to have made an adverse finding on the credibility of the testimony of Messrs Matebele and Mashilo:

41.4.1 Matebele testified that the unidentified person is still employed, yet he is unable to identify him;

41.4.2 Mashilo's testimony was not clear on whether he was at the scene, but Mr Sithole identified him (placed him at the scene), Matebele effectively placed Mashilo at the scene when he testified that Mashilo was not the one who interfered with Mr van Zyl as Mashilo was standing far away and was not one of the people who surrounded Van Zyl. The commissioner notes that it was not clear whether he was absent from the scene or one of the people who surrounded Van Zyl, but as Sithole identified Mashilo (as being at the scene), and Matebele's testimony effectively places Mashilo at the scene, he accepted that Mashilo was *"… equally guilty as others"*;

41.5 In the next paragraph, the commissioner then concludes that *"… the employer discharged its onus. I therefore find that the Applicants' dismissal was substantively fair. In the circumstances, I do not accede to the Applicants' request of reinstatement"*.

[42] As any angry teenager can confirm, being deprived of reasons for a finding, ruling or instruction by a higher authority undermines trust in and understanding of the decision-maker. Transparency of the thought process has the opposite effect: providing parties with reasons for the outcome enhances understanding and limits the risk of unnecessary dispute. It also fortifies accountability in that decision-makers are held accountable for their decisions and the reasoning leading to the decisions. It facilitates the right (of a court, in this case) to review decisions, bolsters the legitimacy of the decision-making process and promotes consistency and predictability.

[43] Commissioners must provide adequate reasons for their findings for all the above and many more sound and valid reasons. The standard does not relate to sterling penmanship, or mathematical precision or even telescopic clarity in thinking evidenced in the award. Commissioners should merely provide such reasons as to

allow an intelligent layperson to follow their thinking and understand how or why they arrived at a particular outcome. Even if the reader disagrees with the outcome, they should be able to follow the commissioner's reasoning and, in light of it, indicate why they disagree with the outcome or where they feel the commissioner deserted the desired path to the right outcome. Awards that leave the reader frustrated and perplexed as to how the outcome was reached detract from the principles of transparency, accountability and legitimacy. Commissioners cannot expect the parties to labour disputes to take it on faith that they have considered the matter: the award must lay the foundation for that belief.[20]

[44] The LAC in *National Union of Mineworkers and another v Rustenburg Platinum Mine (Mogalakwena Section) and others*[21] correctly cautioned us against elevating the standard of award to be expected from commissioner.

> 'Commissioners are not expected to give awards that are akin to judgments of the Supreme Court of Appeal or the Constitutional Court. Awards are not meant to be perfect or satisfactory in all respects. The mere fact that an award is unsatisfactory in one or more respects does not mean that it is unreasonable.'[22]

[45] The current award is not only far from perfect or satisfactory - it is not reasonable when considering the issues to be determined, the evidence before the commissioner and the reasons he provided for his finding.

[46] The commissioner was required to consider whether the employees committed the misconduct that resulted in their dismissal from the service of the employer. The employer relied on the conduct of the employees in respect of alleged *"sabotage, interference with security personnel, and obliteration of evidence"*. The employer did not rely on derivative misconduct as the reason for dismissal. Instead, in their closing arguments at the CCMA,[23] the employer disavowed any reliance on

[20] See Springsteen, B *Thunder Road* (1975) where the author states *"… show a little faith, there's magic in the night"*. Employers and employees need more than a promise of diligence, competence and integrity to have trust in our labour dispute resolution system. The awards issued by the CCMA are external manifestations of the efficacy of the tribunal.
[21] (2015) 1 BLLR 77 (LAC); [2014] ZALAC 62.
[22] Ibid at para 26.
[23] Record of proceedings, page 151, para 37.

that concept based on its interpretation of the Constitutional Court judgments in *National Union of Metalworkers of SA on behalf of Nganezi & others v Dunlop Mixing & Technical Services (Pty) Ltd & others (Casual Workers Advice Office as Amicus Curiae)*[24] and *NUMSA obo Dhludhlu and others v Marley Pipe Systems (SA) (Pty) Ltd*[25].

[47] The parsimonious reasons provided by the commissioner do not assuage concerns about his consideration of the conflicting versions of the evidence. This is compounded by the repeated references to derivative misconduct – whether referencing the concept, alluding to evidence that could support a finding of derivative, or his clear disapproval of the employees' unwillingness to assist the employer in identifying "the culprit".

[48] Considering the award, I am in agreement that it amplifies concerns that the commissioner did not assess (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities. At best, one can surmise from the award that he made an adverse finding on the credibility of Mashilo and Matebele, and that he preferred Sithole's version relating to Mashilo's presence at the scene to that of Mashilo (and Matebele). He gives no insight into his thinking on why he concludes that Matebele's testimony (that Mashilo was not part of the people who surrounded Van Zyl and that Mashilo was standing far away from Van Zyl) corroborates Sithole's testimony in respect of Mashilo, rather than concluding that Matebele's testimony is not destructive of Mashilo's own testimony, which could have resulted in him providing reasons for his thinking of why he prefers Sithole's version of Mashilo's position.

[49] In the award, the commissioner does not provide any indication of his assessment of the evidence in respect of two of the applicant employees, Messrs Masakona and Sibanyoni. He provides no indication of his assessment of the testimony of the employer's witnesses, save his comments about Sithole's testimony regarding Mashilo's position at the time of the incident. The commissioner further dives directly from his views on the evidence of Mashilo, Sithole and Matebele, to

[24] (2019) 40 ILJ 1957 (CC); [2019] 9 BLLR 865 (CC).
[25] 2022 (12) BCLR 1474 (CC); [2022] ZACC 30 at para 20.

determining the appropriateness of the sanction. His reasoning in this regard is linear: the employer discharged its onus, therefore the employees' dismissal is substantively fair, and he denies them their *"… request of reinstatement"*.

[50] From the award, it appears that the commissioner concluded that the employer discharged its onus (of proving the fairness of the dismissal), and that he came to this conclusion by considering the aspects he recorded in paragraphs 56-61 of the award. Paragraphs 56-58 reflect his views on derivative misconduct and factors in support of that concept, whilst 59-61 noted his assessment of aspects of the evidence of Messrs Mashilo, Sithole and Matebele. He does not deal with the assessment of other evidence before him, and certainly gives no indication of any consideration to the appropriateness of dismissal as a sanction.

[51] I pause to note that sabotage, interference with the security staff (especially during a strike) and destruction of evidence will always be very serious misconduct, if proven, and almost inevitably result in justifiable dismissal. This court has expressed its disdain regarding the scourge of violence that typified strike action in various industries or workplaces. The Constitutional Court similarly lamented in *NUMSA obo Dhludhlu and others v Marley Pipe Systems (SA) (Pty) Ltd*[26] that *"[s]adly, acts of violence and intimidation by large groups of employees at the workplace during strikes – protected or unprotected – are not a rare occurrence"*. There is clearly no place for such conduct and employees committing violent offences should expect no sympathy from the CCMA or court. However, the commissioner is still obliged to determine whether dismissal is the appropriate sanction.

[52] In applying his mind to this requirement, he is obliged to consider the totality of the evidence. This test has been phrased in various ways over the years, but in essence it revolves around a consideration of the circumstances of the employees, the impact on the employer and the industrial community.[27] Even under

[26] Ibid at para 20.

[27] See, for instance, Schedule 8, item 3, which requires the following of employers in determining the appropriate sanction.

> '(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record

circumstances where exceptional mitigating or extenuating factors would be required to save an employee from dismissal having committed serious acts of misconduct, at the very least the commissioner should consider whether such factors exist and, if not, give an indication that he was alive to those factors (or absence of evidence in support of it) when considering the appropriateness of the sanction. In this case, he failed to do so.

[53] I am unable to conclude that the commissioner fulfilled his duty to consider and evaluate the evidence before him in line with the court's expectations as expressed in *SFW.* His apparent pre-occupation with derivative misconduct appears to have clouded his views in respect of the employees. Whilst he was required to confine himself to the fenced slope of considering the employer's stated reasons for dismissing the employees, he went *off piste* and traversed the illicit grounds - reasons on which the employer did not rely in dismissing the employees.

[54] Does the arbitration award evidence a reasonable outcome and consideration of the totality of the evidence? Reasonableness requires more than a mere rational connection between input and output. In *Minister of Home Affairs and Others v Scalabrini Centre and others*[28] the SCA drew our attention to the distinction between rationality versus reasonableness, reasoning that the latter is a higher hurdle to clear.

> 'Rationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made.'

[55] The Constitutional Court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*[29] clarified as follows:

> '[Reasonableness] is a variable but higher standard [than rationality], which in many cases will call for a more intensive scrutiny of administrative decisions.'

> and personal circumstances), the nature of the job and the circumstances of the infringement itself.'

[28] 2013 (6) SA 421 (SCA); [2013] 4 All SA 571 (SCA) at para 65.

[29] 2006 (2) SA 311 (CC); [2005] ZACC 14 at para 108.

[56] In *Myers v National Commissioner of the SA Police Services & others*[30] *(Myers)* the SCA also considered the standard of reasonableness applicable to the review of awards of this nature. It cautioned against adopting an approach that will require gross unreasonableness to be proven to set aside an award. The SCA held that such a standard is not appropriate and cannot be the test for reasonableness reviews. The test is rather whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.

> 'It must therefore follow that to survive scrutiny the decision to dismiss must be 'reasonable' and reasonableness must be tested in the light of the facts and circumstances of a given case. In its judgment the majority in the Labour Appeal Court correctly recognized (in para 103) that the test for dismissal was the one set out in *Sidumo*. In my view, however, it erred in its application of the test to the facts in the present matter. In para 104 the majority accepted that the sanction imposed on the appellant was 'a harsh sanction' but then added that 'it is not so unreasonable that it stands to be reviewed and set aside'. The majority of the Labour Appeal Court appears to have accepted that the decision was unreasonable, but not sufficiently unreasonable to warrant interference. This seems to be an application of the 'gross unreasonableness' test of the pre-1994 era. By adopting such a standard the court inadvertently imported a higher standard than that contemplated in *Sidumo*. Were this to be the test, it would mean that a dismissed employee seeking to set aside a dismissal would have to show not only that the decision-maker's decision is unreasonable but that it is 'so unreasonable' that it falls to be reviewed and set aside. That cannot be the test.'[31]

[57] The arbitration record is regrettably incomplete. The transcription provided does not capture three out of the four employer's witnesses. This limits the ability of the court to consider the evidence with a view of determining whether sufficient evidence was served before the commissioner, even where he failed to record it, his assessment of it or the weight attached to it, in the award. In *National Union of*

[30] (2013) 34 ILJ 1729 (SCA).
[31] *Myers* above at para 28.

Mineworkers and another v Rustenburg Platinum Mine (Mogalakwena Section) and others above the LAC provided the following guidance.

> 'When analysing an award, the reviewing court must look at all the material that was before the commissioner and not only the reasons given by the latter in the award. Where the material before the commissioner shows that there are other reasons, except those mentioned by the commissioner, which render the award reasonable, the reviewing court must consider such evidence.'[32]

[58] Considering the missing portions of the record (testimony of three of the company's four witnesses), I am of the respectful view that the approach of the Constitutional Court in *Baloyi v Member of the Executive Committee for Health & Social Development, Limpopo & others*[33] would be appropriate.

> 'What should the Labour Court do when faced with a review application where the record of the arbitration proceedings sought to be reviewed is incomplete? The adverse consequences to the applicant's right of access to courts and to fair practices are plain. Regrettably, incomplete, patched-up records caused by faulty mechanical equipment or lost tape recordings are not uncommon. But it is rarely appropriate for a court to proceed on patch work where the parties have not tried to reconstruct as full and as accurate a record of the proceedings as the circumstances allow.'[34]

[59] Both counsel were in agreement that the matter should be referred back to the third respondent in the event that this court reviews and sets aside the award. They also correctly agreed that it would not be appropriate to award costs against either party in the light of the relevant facts. I am in agreement and thank both parties for the professional, spirited arguments presented and engagement on the material issues raised.

[60] I find that the commissioner's award stands to be set aside. The interests of justice demands that the matter be reheard before a different commissioner.

---

[32] (2015) 1 BLLR 77 (LAC); [2014] ZALAC 62 at para 27.
[33] (2016) 37 ILJ 549 (CC); [2016] 4 BLLR 319 (CC).
[34] Ibid at para 58.

[61] In the premise, I make the following order:

Order

1. The arbitration award issued by the second respondent on 5 August 2021 in case number MPEM 361-21 is reviewed and set aside.
2. The unfair dismissal dispute in case number MPEM 361-21 is referred back to the third respondent for arbitration before a commissioner other than the second respondent.
3. There is no order as to costs.

J. Botes
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv. A. Cook
Instructed by:	Larry Dave Incorporated
For the Respondent:	Sonette Lancaster
Instructed by:	Lancaster Kungoane Attorneys