THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 02/2023

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA ("NUMSA") obo MOTLOUNG TUMELO AND 20 OTHERS — **First Appellant**

and

POLYOAK PACKAGING (PTY) LTD — **First Respondent**

THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL ("MEIBC") — **Second Respondent**

COMMISSIONER HUMPHREY NDABA *N.O.* — **Third Respondent**

Heard: **17 September 2024**

Delivered: **17 December 2024**

Coram: **Savage ADJP, Van Niekerk JA, *et* Jolwana AJA**

JUDGMENT

VAN NIEKERK, JA

LABOUR APPEAL COURT

Introduction

[1] This appeal and cross-appeal concerns events that took place six years ago, in October 2018, during a protected strike at the first respondent's premises in Pinetown, KwaZulu-Natal. The first respondent (Polyoak) specialises in the manufacture and design of thermos-formed blow injection and compression moulded plastic packaging. The appellants were at the time all members of the National Union of Metalworkers of South Africa (the union). They were among a group of 21 employees dismissed by Polyoak on 24 January 2019 after a lengthy disciplinary hearing[1] into allegations of strike-related misconduct. The charges brought against the employees and for which they were dismissed were non-compliance with an interim interdict granted by the Labour Court on 19 October 2018[2] and further, interfering with Polyoak's business, intimidation and harassment of employees, suppliers, customers and deliveries, and interfering with Polyoak's business.

[2] The union referred an unfair dismissal dispute to the second respondent (the bargaining council) on 18 February 2019. After an unsuccessful attempt at conciliation, the dispute was referred to arbitration.

[3] The arbitrator found that 11 of the 21 employees had committed the misconduct with which they had been charged and confirmed the fairness of their dismissals. The union does not dispute that decision. The 11 employees played no part in the subsequent review application, nor did they play any role in this appeal. Of the remaining 10 employees, six were found to have been unfairly dismissed and reinstated with backpay, but limited to 48 weeks' wages (Sithole, Nene, Shozi, Nxumalo, Ntuli and Memela). Three employees (Motlaung, Sokhela and Jezile) were identified as having committed various acts of misconduct. Notwithstanding this finding, the arbitrator held that they had been unfairly dismissed because the acts of misconduct had not formed the basis of the charges against them. These employees were not reinstated.

[1] The disciplinary hearing was conducted by a senior commissioner of the CCMA, Dr Hilda Grobler, and extended over four days.
[2] The interim order, among other things, interdicted and restrained the employees from intimidating and harassing employees, suppliers, customers and deliveries to Polyoak.

LABOUR APPEAL COURT

They were granted compensation equivalent to 24 weeks' wages because their conduct had the "*potential to impair future relations*". Similar findings were made in respect of one further employee (Ngubane) who was also not reinstated but was granted compensation.

[4] Both Polyoak and the union filed applications to review and set aside the arbitrator's award. Polyoak challenged the arbitrator's findings in respect of the six employees who were found unfairly dismissed and reinstated, as well as the four employees who were found to have been unfairly dismissed and compensated. The union challenged the arbitrator's decision to limit the retrospective effect of the order of reinstatement in respect of the six employees who had been reinstated, and his failure to reinstate the four employees who were awarded compensation.

[5] The Labour Court held that the dismissals of the six employees found to have been unfairly dismissed and reinstated by the arbitrator were substantively and procedurally fair. In respect of the four employees granted compensation, the Court upheld the arbitrator's decision that the dismissals of three of them (Sokhela, Jezile and Ngubane) were unfair, but left undisturbed the award of compensation made by the arbitrator in respect of these employees. In respect of the fourth employee (Motloung), the Labour Court found that he had been fairly dismissed.

[6] With the leave of this Court, the union appeals against the Labour Court's order. The first respondent has filed a cross-appeal in respect of the Labour Court's finding that Ngubane had been unfairly dismissed.

Factual background

[7] The incidents that gave rise to the employees' dismissal occurred during a national strike in the plastics industry. The strike commenced on 15 October 2018. On 19 October 2018, the Labour Court granted an interim interdict that ultimately formed the basis of the charges of misconduct brought against the employees, as well as an order declaring that the national strike was protected. In terms of the interim interdict, among other things, Polyoak's

LABOUR APPEAL COURT

employees were to maintain a distance of at least 150 metres from the Polyoak plant. The employees complied with the order, which placed them on Manchester Road, at a point opposite the Bata Shoe factory. Manchester Road is a cul-de-sac, with the Polyoak plant on one end of the road and a T-junction, being the intersection with Crompton Street, Pinetown, at the other.

[8] The present dispute arises from charges brought against employees whom Polyoak alleged had committed acts of misconduct. Polyoak charged only those employees that it could positively identify as having participated in such acts and appointed a senior commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA), Dr Hilda Grobler, to conduct the disciplinary hearing. The charges were first, that the employees had breached the terms of the interim interdict; second, that they had intimidated and harassed employees, suppliers, customers, and deliveries to Polyoak; and third, that the employees had interfered with Polyoak's business.

[9] The disciplinary hearing commenced on 20 December 2018. Polyoak introduced a number of silent video recordings, all of which assumed some significance in the later review proceedings before the Labour Court and in these proceedings. The first video was taken on 19 October 2018 and shows employees toyi-toying at the access gate of another employer affected by the strike, Mpact Plastics. The video shows a fire being lit by two Polyoak's employees, Dyakophu and Motloung. Two other Polyoak employees, Sokhela and Ntuli, are shown feeding the fire. This incident was ultimately not the subject of any of the charges of misconduct later brought against these employees, but it bears some significance to the arbitrator's decision not to reinstate certain employees found to have been unfairly dismissed and to grant them compensation.

[10] Two videos taken on the morning of 23 October 2018 (referred to in the proceedings under review as videos 3 and 4 respectively) formed the basis of charges against the employees. At the disciplinary hearing, the union conceded that the employees identified by name in the photographs (or screenshots) extracted from the video footage and submitted in evidence,

LABOUR APPEAL COURT

were correctly identified. In her commendably comprehensive findings, the chairperson of the hearing found the credibility of the union's witnesses wanting and the union's version improbable, at times absurd, and more often than not fabricated. Of the 23 employees initially charged with misconduct in relation to the incident on 23 October 2018, 21 employees were found guilty and summarily dismissed.[3] One of the employees, Ngubane, was identified by the chairperson as having been involved in a separate incident that occurred on 30 October 2018 and was found on that basis to have committed misconduct and dismissed.

[11] The union disputed the fairness of the employees' dismissal and referred the matter to the bargaining council for arbitration.

The arbitrator's award

[12] The arbitrator issued his award on 18 January 2021. He considered that charge 1, that of failing to comply with the court order, was subsumed by charges 2 and 3, and proceeded discretely to consider each of the latter charges. On charge 2, that of intimidating employees, suppliers, customers and deliveries, the arbitrator recorded that the video footage taken on 23 October 2018 showed Shezi, Dlamini, Malinga and Ngcobo committing various acts of misconduct, while Dyakophu, Ndlovu, Dlala, Ngwane, Nkosi and Khathi were seen on the right-hand side of the road with them. In respect of these employees, the arbitrator concluded:

> '95. None of the employees standing on the extreme right on the road bothered to give evidence and to take the arbitration into their confidence...
>
> 96. I am satisfied that despite the fact that the video is silent Patrick Shezi who is seen pulling a log that tripped a security, Delani Dlamini who is pointing a finger at the driver, Desmond Malinga who is also pulling a

[3] Lucky Nsthunsha and Wilson Maphumulo were found not to have committed the misconduct that formed the subject of the charges and acquitted.

LABOUR APPEAL COURT

log and Petrus Ngcobo who is brandishing a stick have a prime facie case to answer in relation to charge 2…

98. In the absence of evidence to the contrary from the other side the proof become conclusive.

99. Patrick Shezi, Delani Dlamini, Desmond Malinga and Petrus Ngcobo did not testify for reasons best known to themselves. In my view it was necessary for them to respond to the prima facie case so that I could assess inherent probabilities and come to a conclusion either way on a balance of probabilities.

100. In regard to charge 2 it is my conclusion that the employer has shown on the balance of probabilities that Patrick Shezi, Delani Dlamini, Desmond Malinga and Petrus Ngcobo are guilty of charge 2.'

[13] In regard to charge 3, that of interfering with Polyoak's business, the arbitrator records that the video shows Shezi, Dlamini, Malinga, Ngcobo, Dyakhophu, Ndlovu, Dladla, Ngwane, Nkosi and Khati on the right-hand side of the road. In the arbitrator's view, these employees were guilty of charge 3 since the video evidence constituted *prima facie* evidence of interference with Polyoak's business. In respect of these employees, the arbitrator concluded:

'101. …These employees are not prohibited to be where they are as long as they don't interfere with the business of the respondent. A car is seen coming and swerving to the right pavement to pass through. The truck also is seen swerving to the pavement to go through. In my view if the employees were just singing and dancing, why did they not move away so that cars could pass through the tar road? Why should cars go over the pavement when there is the road for them to use? Why should the truck go over the pavement instead of using the tar road?

102. In my view the video evidence constitutes *prima facie* evidence of interference with the business of respondent. Traffic is being hindered to use the tar road. One does not have to completely block the road even partial blockage which inconvenience road users is unacceptable.

LABOUR APPEAL COURT

> 103. In the circumstances I accept that respondent has shown their guilt on a balance of probabilities.'

[14] The arbitrator came to a different conclusion with respect to Sithole, Nene, Shozi, Nxumalo, Ntuli and Memela. The arbitrator's reasoning in support of his decision to absolve them of any culpability for the misconduct with which they had been charged is clear enough – he considered that they were in the wrong place at the wrong time. Specifically, he found:

> '121. These are the employees who were not in the middle of the road when the car and truck arrived at the picketing. Most of them have long services with their company. In my view these employees got into harm's way for being where they were standing when the Human Resource Officer took a cell phone video. Their dismissal has caused severe harm to their families and their personal images. In our labour market we should endeavor at all times to ensure that the innocent do not become victims in our often heated industrial disputes. This is so because their victimhood is also automatically experienced by their dependents. In our country most families are large extended families depending on a single bread winner.'

[15] The arbitrator decided that these six employees should be reinstated with 48 weeks' wages in backpay payable to each applicant. Other than to state that this is a remedy that *"will be fair and equitable in the circumstances"*, the arbitrator provides no reasons for this conclusion, nor does he furnish reasons why he did not order reinstatement.

[16] In respect of Sithole, Jezile, Motloung, Nene, Shezi, Nxumalo, Ntuli, Memela and Sokhela, the arbitrator makes the following finding:

> '105. …. [They] are not seen with those blocking the traffic as the car and truck is seen approaching the picket. As the events unfolded they are also seen in the middle of the road. Respondent argued that the nine employees associated themselves with the others. They put fires on the road. They failed to restrain others and at times they moved to intermingle with those on the extreme right.'

LABOUR APPEAL COURT

[17] In the case of Ngubane, at paragraph 104 of his award, the arbitrator finds that Ngubane did not appear on the video "*and therefore the respondent has not proved charge 2 & 3 against him".* The arbitrator makes the following finding:

> '119. Van Kerken testified that Sicelo Ngubane drove the car that obstructed the truck leading it to swerve. Sicelo Ngubane was not charged with this conduct. He did not testify to clear the issue. In the absence of his evidence I am bound to accept the incontrovertible evidence of Van Kerken that the incident occurred.
>
> 120. I further accept that such an incident has a potential harm trust and future relations. In the circumstances compensation will be an appropriate relief.'

The review

[18] Both Polyoak and the union filed applications in terms of section 145 of the Labour Relations Act[4] (LRA) to review and set aside the arbitrator's award. Neither application was directed at the arbitrator's finding in regard to the 11 employees he considered to have been fairly dismissed, i.e. those employees identified as forming the group on the right-hand side of the road. Of the remaining 10 employees, those whom the arbitrator had found to have been unfairly dismissed, the review filed by Polyoak was directed at that decision and the remedies of reinstatement and compensation granted by the arbitrator.

[19] Polyoak contended that there was no reasonable or rational basis for the arbitrator not to uphold the dismissals of the six employees who were reinstated, and the four employees who were awarded compensation. In particular, Polyoak challenged the arbitrator's factual finding that there was a material distinction to be drawn between the group of employees standing on the left, and those standing on the right of the roadway, and that it was only those standing on the right who had engaged in misconduct. Polyoak averred

[4] Act 66 of 1995, as amended.

LABOUR APPEAL COURT

that the evidence disclosed that the group on the left-hand side had spilled from the narrow verge into the road and were thus part of the barricade, and that all of the employees had engaged in blocking the road and in particular, impeding the progress of the delivery truck. Polyoak averred further that it had presented substantial evidence to establish a *prima facie* case against each of the dismissed employees, and that in the absence of any evidence to the contrary, the arbitrator ought properly to have accepted that Polyoak's version was the more probable. In relation to Ngubane, Polyoak submitted that the evidence disclosed that he had been dismissed for a separate incident, that which occurred on 30 October 2018, and that in his award, the arbitrator had found the evidence against in respect of this incident 'incontrovertible'. There was thus no basis for the arbitrator to have found that Ngubane had been unfairly dismissed.

[20] In its review application, the union contended that the six employees found by the arbitrator to have been unfairly dismissed and reinstated ought properly to have been reinstated with full retrospective effect. In particular, the union submitted that there was nothing in the evidence that served to justify the arbitrator's curtailment of the award of reinstatement. Further, in respect of the four employees awarded compensation, the union contended that since reinstatement is the primary remedy for an unfair dismissal and in the absence of proper evidence that reinstatement was impractical, no reasonable decision-maker would have refused to reinstate the employees. The union thus sought a variation of the arbitration award to provide for the reinstatement of the six employees with full retrospective effect and the reinstatement, on the same basis, of the four employees who had been awarded compensation.

[21] The primary issue on review was the arbitrator's factual finding that two discrete groups were to be identified on Manchester Road on the morning of 23 October 2018, those referred to as the 'left-hand group' and the 'right-hand group', and his factual finding that the former did not commit any acts of misconduct.

LABOUR APPEAL COURT

[22] In its review of the evidence, the Labour Court summarised the video evidence relating to the incident on 23 October 2018 as follows:

> '19.1 Video 3 is clear evidence of employees barricading the road, it is serious misconduct, there are two fires on the road. There is nothing to suggest that each of the individuals had not individually chosen to participate in the barricade. Tumelo Motloung, Patrick Shezi, Petros Ngcobo, Mfanafuthi Bakhopo, Siyabonga Khati, Mbulelo Ngwane, Dumasani Nkosi, Wonderboy Sithole, Khulani Nxumalo and Desmond Malinga are identified. The witness Singh who identified the employees indicated that these were the employees on the right and that was because those on the right were clearly more easily identifiable. This was never disputed. Wonderboy Sithole, Tumelo Motloung, Siyabonga Khati and Khulani Nxumalo are however not considered guilty by the arbitrator breaking the terms of the Court order, in other words not guilty of barricading or participating in the barricading, interfering with the flow of traffic and not interfering with the business of Polyoak. Even without a Court order they were barricading the road and part of how this was done by two fires which they stood next to. They further pulled branches into the road. The fires cannot be ignored as a potential safety hazard and the cause of damage to the road. It is a probable inference that the parking of Shezi's vehicle was part of the barricade.'

[23] In regard to video 4, the Labour Court said the following:

> '19.2 Video 4 is the Polyoak truck coming out of the premises and down the road. It is clear that the truck has to be guided by security and the members of management. The truck cannot proceed down the left-hand side as the road is blocked. Branches must be cleared, and an employee pull sponsors back into the road after they have been cleared. The arbitrator correctly identifies that all the employees move into the road and to the right as the truck approaches and is passing. The arbitrator does not accept this as a clear indication or action that each individual is participating in the barricade and was at the very least interfering with a Polyoak truck trying to get out to make deliveries. The observed actions however are clearly not actions

LABOUR APPEAL COURT

consistent with an employee who got in harm's way when the HR person happened to be recording and persons who had no involvement whatsoever. This is simply not borne out by the evidence. The still photographs of Khuklukani Nxumalo, Lucky Memela, Clarens Shozi, and Wonderboy Sithole are not consistent with persons who simply got in harm's way and had simply been on the pavement on the left-hand side of the road.'

[24] In relation to Motloung, the Labour Court considered that the arbitrator's failure to make a finding regarding his participation in the barricade constituted misconduct in his duties as commissioner, was not rationally linked to the evidence, and thus constituted a finding to which no reasonable arbitrator could come. The Court observed that the video evidence disclosed that Motloung was visible in video 3, in a distinctive yellow jersey, on the barricade. In the Court's view, this separated Motloung from the 'Mpact group'.

[25] On the nature and seriousness of the misconduct, the Labour Court said the following:

'15. The arbitrator accepts that participation in barricading the road is misconduct of such a nature that it is substantively fair reason to dismiss. The Employees have not sort (sic) to challenge the arbitrator's finding in this regard relating to the employee's (sic) on the right. Polyoak and the Chair of the disciplinary enquiry point to what this Court has repeatedly stated about misconduct during strikes which involve violence and the destruction of property. There is no need to make further comment or express feeling in this regard. Objectively assessed making fires in a road and pulling branches across the road amounts to a barricade and it's an intention to stop or hinder movement. Much was made of the fact that there was no direct evidence as to who started the fires. The arbitrator correctly finds that the only proper inference to draw is that it was the Employees who made the fires. Participation in the barricade requires physical presence at or near the barricade. One cannot claim disassociation if you are standing at the barricade and you have no other explanation

LABOUR APPEAL COURT

> for your presence, save for participation in the barricade. It is clear that Employees in video 3 and video 4 are participating in blocking the road. This is not the application of common purposes.'

[26] The Court concluded that the arbitrator's finding, reinstating the six employees, was not rationally linked to the evidence and that the distinction drawn by the arbitrator between them and those employees whose dismissals were upheld, was arbitrary. As the Labour Court put it, "*[t]here is no apparent basis for the distinction, where the distinction starts and ends or how it can possibly be found that some of the employees just happened to be there"*.

[27] While the Labour Court accepted that the arbitrator was 'robust and rigorous' in his assessment of the evidence, that assessment was coloured by what the Court described as the arbitrator's sympathy for the long service of the employees concerned and the consequences for them of their dismissals. The Labour Court held that while sympathy is an aspect of fairness and not itself untoward, "*sympathy cannot override the evidence nor the other aspects of fairness…*".

[28] The arbitrator's award was thus reviewed and substituted by an award in terms of which the six employees whom the arbitrator had found to have been unfairly dismissed were declared to have been fairly dismissed and entitled to no relief. In regard to the four employees found to have been unfairly dismissed but whose remedy had been limited to compensation, the Labour Court held that the arbitrator's finding that Motloung had been unfairly dismissed was reviewable, on the basis that he was guilty of the misconduct with which he had been charged. Specifically, the Labour Court found that Motloung was clearly identified as having been involved in the barricade. The Labour Court accordingly varied the arbitrator's award so as to include Motloung in the category of those employees whose dismissals were fair.

[29] In respect of the remaining three employees (Sokhela, Jezile and Ngubane), the Labour Court found no basis to interfere with the arbitrator's reasoning that they had been unfairly dismissed because the acts of misconduct that they had committed did not form the basis of the charges against them. The

LABOUR APPEAL COURT

Court also found that there was no basis to interfere with the arbitrator's conclusion that their misconduct warranted the limitation of their remedy to an award of compensation.

[30] In sum: all of the employees, but for Sokhela, Jezile, and Ngubane, were found to have been fairly dismissed for their participation in the barricade on 23 October 2018, and thus not entitled to any relief. The Court upheld the arbitrator's findings that the dismissals of Sokhela, Jezile and Ngubane were substantively unfair and that their remedy should be limited to one of compensation.

The appeal

[31] NUMSA appeals against the Labour Court's finding in respect of the six employees who were reinstated with limited backpay, and Motlaung. Specifically, the challenge is to the Labour Court's finding that the arbitrator committed a reviewable irregularity and arrived at an unreasonable decision when he found that they were not guilty of misconduct. The union also challenges the Labour Court's failure to vary the arbitrator's award to grant full retrospective reinstatement to all 10 employees whose dismissals were found by the arbitrator to be substantively unfair (i.e. the six employees who were reinstated with limited backpay plus the four who were awarded compensation). The union thus seeks an order setting aside the judgment of the Labour Court and substituting it with an order that Polyoaks' review be dismissed, that the union's review be upheld, and that the 10 employees listed in the union's review application be reinstated with full retrospective effect.

The cross-appeal

[32] The cross-appeal concerns only the Labour Court's order that Ngubane's dismissal was substantively unfair, and his award of compensation. Polyoak submits that the Labour Court erred when it upheld the arbitrator's finding that Ngubane had been unfairly dismissed. Polyoak thus seeks an order that the appeal be dismissed, and the Labour Court's order be varied only to the

LABOUR APPEAL COURT

extent that it is substituted with an order upholding the substantive fairness of Ngubane's dismissal.[5]

Analysis

[33] In its grounds for review, Polyoak did not contend that the arbitrator's failure to consider material facts constituted, in itself, a gross irregularity, the reasonableness of the outcome thus being irrelevant to the enquiry.[6] The ground for review on which Polyoak relied was that the arbitrator committed a reviewable irregularity in his assessment of the evidence, with the result that the outcome of the hearing, in the form of his decision regarding all but the 11 employees who were found to have been fairly dismissed, failed to meet a threshold of reasonableness. Put another way, what served before the Labour Court was what has been referred to as a 'reasonableness review'. To succeed in a review application brought on these grounds, it is well-established that an applicant must establish both some misdirection in the conduct of the proceedings and that the outcome, in the form of the award, is unreasonable. In other words, even if the record discloses a reviewable irregularity in relation to the commissioner's conduct or reasoning, provided the result or outcome falls within a band of decisions which a reasonable decision-maker could reach on the available evidence, the award cannot be assailed.[7]

[34] Both this Court and the Supreme Court of Appeal have held that in review proceedings conducted under section 145 of the LRA, material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside.[8] That is not to say that the correctness is of no consequence. The relationship between the correctness or otherwise of the award under review and the reasonableness

[5] In the result, there is no challenge to the Labour Court's findings in respect of Sokhela and Jezile.
[6] A basis for review recognized in *Murray & Roberts Cementation (Pty) Ltd v Association of Mineworkers & Construction Union on behalf of Dube & others* [2023] ZALAC 26; (2024) 45 ILJ 276 (LAC).
[7] The test established by the Constitutional Court in *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).
[8] See *Herholdt v Nedbank Ltd (Congress of Suth African Trade Unions as* amicus curiae) [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA).

LABOUR APPEAL COURT

enquiry was the subject of the often-cited judgment of this Court in *Head of Department of Education v Mofokeng and others*[9] (*Mofokeng*), where Murphy AJA said at paragraph 31 of the judgment:

> 'The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The Court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence.'

And further:[10]

> 'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result.'

[9] [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC).
[10] *Ibid* at para 33.

LABOUR APPEAL COURT

[35] As Myburgh notes,[11] this formulation requires the reviewing court that identifies an error or irregularity on the part of the arbitrator to determine whether it was material. This would be the case if but for the error or irregularity, the arbitrator would have come to a different result. If this is established, the incorrect result arrived at by the arbitrator is *prima facie* unreasonable. The enquiry then moves to a consideration of whether the result is nonetheless capable of justification, having regard to the totality of the evidence.

[36] The present matter, as I have indicated, concerns a review of factual findings made by the arbitrator and the Labour Court's judgment that on the evidence, the arbitrator's conclusions of fact are "*not rationally linked to the evidence*" and that the award thus fails to meet the reasonableness threshold. It follows from *Mofokeng* that this calibration, which sets the threshold for reasonableness overall at the level only of some rational connection between the evidence and the outcome, will not always account for a decision that is demonstrably or obviously wrong.[12]

[37] The union contends that the factual findings made by the arbitrator were correct, i.e. that some employees were merely present at the scene and depicted in the video while the truck was passing the barricade. Counsel for the union submitted that the Labour Court (and the arbitrator) had ignored the common cause fact that the employees were standing at a point precisely 150 metres from the Polyoak entrance, opposite the Bata factory, the distance stipulated by the terms of interim interdict. It therefore followed that the mere presence of the employees at the scene was insufficient to demonstrate their participation in the barricade.

[38] There is no merit in this submission. First, it does not necessarily follow that because the interim interdict placed the lawful picketing area precisely where

[11] A Myburgh SC 'Reasonableness Review- the Quest for Consistency' (2024) 45 ILJ 1377.
[12] In the recent case of *Makuleni v Standard Bank of SA (Pty) Ltd and others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC), this Court considered that the setting aside a factual finding made by a commissioner is warranted if the commissioner's conclusion is 'untenable'. What this suggests is that a factual finding found to be untenable or implausible will fail to meet the threshold of reasonableness. See Myburgh *supra* at p 1389.

LABOUR APPEAL COURT

the employees were standing, that they were merely present at the scene and took no part in the events at the barricade. Secondly, the submission ignores the evidence that served before the arbitrator. While it was common cause that the employees were gathered at a point on or outside of the 150 m radius stipulated by the court order, and that the verge on the left-hand side of Manchester Road narrowed at that point, both the video evidence and the *viva voce* evidence of Polyoak's witnesses establish that the group of employees gathered on the verge and in front of the Corolla parked on the left-hand side move into the road as the Polyoak delivery truck makes its way down the road, towards the barricade. This evidence was not refuted by the union's sole witness Sithole. On the contrary, Sithole conceded that he is shown on the video moving from the verge into the road as the truck approaches. He did not dispute that those were his actions. None of the other employees whom the union now seeks to contend were mere bystanders, rather than active participants in the barricade, gave evidence. In these circumstances, there is no basis to draw the present case, as counsel sought to do, into the ambit of *National Union of Metalworkers of SA on behalf of Dhludhlu and others v Marley Pipe Systems (SA) Pty) Ltd*[13] and its rejection of the application of common purpose and collective guilt to employees. That case concerned the dismissal of 41 employees for an assault on a manager during the course of a strike. They were dismissed notwithstanding the fact that they were not on the scene of the assault, and because their employer considered that they had not taken adequate steps during or after the assault to distance themselves from that misconduct. The present case is one of active participation in the misconduct alleged, and individual complicity. It is not in dispute that Polyoak charged only those employees whom it identified as actually having committed acts of misconduct. This is not a case, as counsel for the union submitted, of sacrificing the potentially innocent for the sake of bringing the potentially guilty to book.

[39] Counsel for the union also sought to raise evidentiary difficulties with the review and submitted that Polyoak's witnesses, and Singh in particular, gave

[13] (2022) 43 ILJ 2269 (CC).

LABOUR APPEAL COURT

lengthy evidence about what was depicted on the video evidence without Polyoak's legal representative placing on record exactly the events to which the witnesses were referring. To the extent that the union seeks now to challenge the identity of the employees who appear in the video recordings, this had never been placed in dispute. As early as the disciplinary hearing, the union conceded that Polyoak had identified the employees depicted in the video recordings, that they were all present and that everyone was correctly identified. There is thus no merit in the belated challenge raised by the union.

[40] To the extent that the union submits that the arbitrator was in a far better position than the Labour Court to make factual observations based on the evidence led, there is equally no merit in this submission. The arbitrator drew his conclusions of fact from the same evidence that served before the Labour Court – he was not in any better position than the Labour Court (or this Court, for that matter) to draw conclusions of fact from the video recordings tendered in evidence and the *viva voce* evidence proffered in the arbitration hearing. The video evidence does not sustain the arbitrator's conclusion that there were two discrete groups of employees present at the barricade, a passive group on the left, and group on the right that actively participated in the blockade. The video evidence depicts, as the Labour Court found, that all the employees standing on the verge move into the road as the delivery truck approaches the barricade. What the arbitrator ignored, for reasons that are inexplicable, is the *viva voce* evidence proffered by Polyoak's witnesses at the arbitration hearing. Ridgard, who when pressed in cross-examination to concede that "*some people were present on the road, other people did more than other people"*, responded that the "*whole group*" was at the barricade built across the road. Again, when it was put to Ridgard that "*some people actively did things that the group didn't d"*. Ridgard denied that proposition and confirmed again that there was a group of people in the road, whose purpose was to stop the truck. He stated that the "*workers were spread out over the road, from west to east or east to west. …They were there manning the barricade".* Similarly, Singh testified that the group of employees on the left-hand side of the road all moved to the centre of the road when the delivery

LABOUR APPEAL COURT

truck approached the barricade. The evidence tendered on behalf of Polyoak was not seriously challenged in cross-examination and was distinctly at odds with the arbitrator's finding of two discreet groups, one culpable in acts of misconduct and the other innocent observers.

[41] The evidence proffered by Polyoak's witnesses must be contrasted with the evidence of the union's only witness, Sithole. Sithole was a poor witness, to say the least. He stated in evidence-in-chief that he had 22 years' service and during that time, only had disciplinary action taken against him on two occasions. During cross-examination, when confronted with his disciplinary record, he was forced to concede that he had received eight warnings, the most recent in 2017, a year before the strike, an extended final warning. Sithole was evasive when asked about the fires in the road and how they were kept burning, and only conceded the existence of two fires when shown the video evidence. Sithole also conceded that he was standing in front of the Corolla, in the road, and that on the right-hand side of the road, there were logs, that any passing traffic would have to go off the road to pass. Sithole conceded that the road was blocked. He also conceded that when the truck moved down the road, with Van Kerken directing the driver, he had moved to the right of the Corolla, and was "*properly in the road*", closer to the fire in the middle of the road. Sithole could not dispute that by being in the road, he presented an obstruction to the delivery vehicle. He conceded that the truck could not pass over the point where he was standing in the road, and that vehicles were forced to leave the road to pass by.

[42] What remains inexplicable is the union's election not to call any further witnesses to challenge the evidence given by Polyoak's witnesses, both in relation to their observation of the video footage tendered, and their personal observations of events on the day. The arbitrator's conclusion that Sithole and other employees who were found not to have committed any misconduct "*were not in the middle of the road when the car and truck arrived at the picketing*" contradicts Sithole's own version of events, reluctantly conceded under cross-examination. The arbitrator proffers no cogent reason for rejecting the evidence of Ridgard, Singh and Van Kerken. He makes no

LABOUR APPEAL COURT

adverse finding as to their credibility, fails to make a determination as to the probabilities of the versions before him and specifically, provides no reasons why the internally consistent version of Polyoak's witnesses is not the more probable. As the Labour Court observed, the arbitrator's factual finding appears to be motivated not on any rational basis, but rather on his sympathy for the long service of the affected employees and the consequences for them of their dismissals.

[43] In short, Polyoak's witnesses all testified that the employees standing on the verge moved into the road when the delivery truck approached, thus actively participating in the barricade. The union's sole witness was forced to concede that when the Polyoak truck moved down Manchester Road and approached the barricade, he stepped from the verge where he was standing into the road and that he thus participated in the obstruction of the passage of the truck. None of the other dismissed employees gave evidence and placed no exculpatory version before the hearing. The video recordings introduced into evidence sustain Polyoak's version of events. It follows that the arbitrator's finding that the six employees were simply in the wrong place at the wrong time and did not participate in the misconduct alleged has no basis in the evidence, and to use the words of *Makuleni v Standard Bank of SA (Pty) Ltd and others*[14], is simply untenable. The award is thus reviewable. On a *Mofokeng* analysis, the arbitrator's error in his assessment of the evidence was material, in that it led to an outcome that would not otherwise have been reached, in circumstances where that outcome is not in any event capable of justification. There is accordingly no basis to interfere with the Labour Court's conclusions in respect of the six employees found by the arbitrator not to have committed any acts of misconduct.

[44] In regard to the cross-appeal, the Labour Court was 'not persuaded' that the arbitrator's finding in respect of Ngubane was a decision to which a reasonable decision-maker could not come, and that the arbitrator's sense of fairness should prevail. The evidence discloses that Ngubane was suspended

[14] *Ibid* fn 12.

LABOUR APPEAL COURT

on full pay on 13 December 2018. He was charged with failing to comply with the court order, intimidating and harassing employees, suppliers, customers, deliveries to Polyoak, and interfering with Polyoak's business. Polyoak's submissions before the Labour Court were to the effect that the arbitrator misdirected himself when he found that Ngubane had been unfairly dismissed because he did not appear in any of the video images, despite the arbitrator recording that Van Kerken had testified that he was travelling with a Peter Hoffman, an employee of Polyoak, following a Polyoak truck. A white Jetta swerved out, causing the truck to take evasive action and drive on the opposite side of the road. Van Kerken got out of the car and confronted the occupants of the Jetta and the driver, Ngubane. Polyoak's case was that Ngubane had been dismissed for this separate incident, on the basis of evidence that the arbitrator later found to be 'incontrovertible'. Polyoak submitted that Ngubane's conduct constituted a deliberate act of intimidation and harassment of the employee driving the truck, and interference with its business operations. Van Kerken's evidence was not challenged in cross-examination, nor, for reasons that are not apparent, was Ngubane called to testify. The evidence that served before the arbitrator was thus Van Kerken's undisputed testimony as to the incident. This notwithstanding, the arbitrator found that charges 2 and 3 had not been proved against Ngubane, since he did not appear on the video. This finding overlooks the fact that Ngubane's dismissal was unrelated to the incidents depicted in the video.

[45] In respect of Ngubane, the arbitrator's decision clearly failed to meet the threshold for reasonableness; first, because the evidence clearly disclosed the misconduct described in the charge and second, because the fact that Ngubane did not appear in any video footage tendered as evidence is not a justifiable basis, in itself, to find that he did not commit the misconduct alleged. The evidence against Ngubane was not the subject of any video recording but rather the undisputed *viva voce* evidence of Van Kerken. In these circumstances, the basis of the arbitrator's conclusion that Ngubane was not engaged in the misconduct that occurred on 23 October 2018 and that his dismissal was thus unfair exhibits both a failure properly to have

LABOUR APPEAL COURT

regard to the evidence and a decision that fails to meet the threshold of reasonableness. The Labour Court erred in making a finding to the contrary, and the cross-appeal thus stands to be upheld.

[46] In summary: the arbitrator's factual findings in relation to the six employees and Motloung whom he identified as not having participated in the barricade on 23 October 2018 and his factual finding that the evidence disclosed no misconduct as against Ngubane disclose a reviewable irregularity that had the result of an outcome to which no reasonable decision-maker could come. The Labour Court's findings thus stand to be upheld but for the finding in respect of Ngubane. In Ngubane's case, the Labour Court erred by finding that Ngubane committed no misconduct because he did not appear in any of the video footage of events on 23 October 2018, in circumstances where no reliance had been placed on that footage to establish his misconduct. In the result, the appeal stands to be dismissed, and the cross-appeal upheld.

[47] The appeal does not concern the Labour Court's findings in respect of the fairness of the dismissals of Sokela and Jezele; the union challenges the Labour Court's decision to uphold the arbitrator's award of compensation as opposed to reinstatement. While Sokhela and Jezele were found to have committed acts of misconduct outside the Mpact premises on 19 October 2018 (erecting barricades and burning tyres), they had not been specifically charged for that misconduct. The arbitrator concluded that:

> '116 …I do accept that they were not charged for this conduct, however this aspect is critical when I am assessing an appropriate relief. These employees did not take the arbitration hearing into their confidence by testifying to explain their conduct.
>
> 117. In my view in the employment sphere it is not only conduct which constitute charges which should be cleared. Any conduct which has a potential to impair future relations should also be cleared.
>
> 118. In the circumstances I accept that their conduct has impairs potential future relations and is not acceptable. Compensation in their circumstances will be a fair and an appropriate remedy.'

LABOUR APPEAL COURT

[48] The Labour Court found that while the arbitrator's reasoning "*may not be perfect*", in the exercise of the discretion conferred by s 193 (2), the arbitrator's decision was reasonable. The Court said

> 'The arbitrator therefore has a discretion which must be exercised in terms of [section 193(2) of the LRA]… Considering the circumstances surrounding the dismissal and the reasonable practicalities including but not limited to the fact that the employees had been engaging in conduct, which was objectively dismissible, that the circumstances of the misconduct were not in a vacuum and that the misconduct during the strike had caused damage to the relationship between Polyoak and the Employees. The arbitrator was alive to these factors, and it cannot be said that a reasonable arbitrator could not reach this outcome. I am not persuaded by the Employees' argument (in their review application) that the arbitrator relied on unrelated events, and this was simply incorrect in law. All the events were related and exclusion of all the surrounding circumstances because it was not alleged would be an artificial construct in the employment context. I further don't accept that the conduct of objectively assessed did not damage the employment relationship or that this was not proved. There are however no cogent reasons to interfere with the compensation, which lies in the hands of the arbitrator to determine, which include factors such as the arbitrator's sense of fairness.'

[49] To the extent that counsel for the union relies on *Booi v Amathole Municipality and Others*[15] (*Booi*) to submit that a high threshold of intolerability is required before there can be a departure from the primary remedy of reinstatement, while it is correct that a conclusion of intolerability should not easily be reached, it does not necessarily follow that a finding of unfair dismissal obliges an arbitrator to order reinstatement. Once an arbitrator has found a dismissal unfair, the arbitrator must consider which of the remedies of reinstatement, re-employment or compensation is appropriate, having regard to s 193 (2), which provides that the arbitrator must require the employer to reinstate the dismissed employee unless any one of the four conditions listed in subparagraphs (a) to (d) is present, including the intolerability of continued employment and the reasonable impracticability of reinstatement or re-

[15] [2021] ZACC 36; (2022) 43 ILJ 91 (CC).

LABOUR APPEAL COURT

employment. An arbitrator is required to have regard to the provisions of s 193 (1) and (2) prior to deciding on an appropriate remedy, As the Constitutional Court observed in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[16], an arbitrator cannot adopt the attitude that because a dismissal is found to be unfair, reinstatement must be granted. A failure to have regard to s 192 (1) and (2) may lead the arbitrator to grant an award of reinstatement in a case where that remedy is precluded by s 193 (2).[17] In *Booi*, the Constitutional Court affirmed that the intolerability of a working relationship must be considered prior to making an order of reinstatement. This is so even if the charges of misconduct could not be proven.[18]

[50] The arbitrator's decision not to reinstate Sokhela and Jezele must be viewed in the light of the fact that the exercise of the arbitrator's discretion in relation to remedy, although the exercise of a discretion in the wide sense, remains a value judgment subject to review by the Labour Court on the same basis as any other value judgment made by an arbitrator. As the Labour Court observed, the arbitrator was aware of the nature of the enquiry that he was to conduct. He had regard to all the relevant circumstances, including the damage that the employees' conduct had caused to the relationship with their employer. Whether the arbitrator's conclusion was correct is not the threshold that the Labour Court had to apply – the Court found that while the arbitrator's reasoning might not be perfect, the result or outcome of that reasoning was not such to render his ultimate decision to award compensation a decision to which no reasonable decision-maker could come. The Labour Court was thus correct to uphold the remedy of compensation awarded by the arbitrator. The appeal against the limited remedy afforded Sokhela and Jezele stands to be dismissed.

[51] Finally, the present matter warrants the observation that it illustrates, in stark terms, the dysfunctionality of the statutory dispute resolution system. The

[16] [2015] ZACC 40; (2016) 37 ILJ 313 (CC).
[17] *Ibid* at para 135.
[18] *Booi supra* at para 36.

LABOUR APPEAL COURT

strike that gave rise to the present dispute occurred six years ago. The employees were dismissed after a four-day disciplinary hearing during which both parties were represented by attorneys. The outcome of that enquiry, conducted as it was by an independent and experienced person who happens to be a senior commissioner in the CCMA, counted for nothing, except to satisfy the requirement of fair procedure. The entire exercise was repeated before the arbitrator a year later in a duplicated process where, for Polyoak at least, the same witnesses gave the same evidence as to the same events. That process was completed more than three years after the date of dismissal. The system of simple, rapid and relatively informal access to labour justice that the LRA sought to establish is undermined both by the duplication in process and the time taken to bring the dispute to some form of finality.

[52] The parties agreed that, in view of the ongoing relationship between them and the Court's approach to the issue of costs in circumstances such as the present, there should be no order as to costs.

[53] In the result, I make the following order:

Order

1. The appeal is dismissed.

2. The cross-appeal is upheld, and the Labour Court's order is varied to read as follows:

   '1. The dismissals of (1) Tumelo Motloung, (2) Delani Dlamini, (3) Patrick Shezi, (4) Petrus Ngcobo, (5) Desmond Malinga, (6) Funafuti Dyakhopu, (7) Mbulelo Ndlovu, (8) Douglas Dalla, (9) Nkululeko Ngwane, (10) Dumisani Nkosi, (11) Siya Ntuli, (12), Siyabonga Khati, (13) Wonderboy Sithole, (14) Sandile Nene, (15) Clarens Shozi, (16) Khulukani Nxumalo, (17) Nkalanipho Ntuli, (18) Lucky Memela and (19) Sicelo Ngubane, are substantively and procedurally fair. Their claim is dismissed, and they are entitled to no relief.

LABOUR APPEAL COURT

2. The dismissals of (20) Siphamandla Sokela and (21) Lennox Jezele are substantively unfair.

3. The Respondent is ordered to pay the following amounts to the employees in paragraph 2 above:

   3.1 Siphamandla Sokhela R37 238.40

   3.2 Lennox Jezele R 37 238.40.'

3. There is no order as to costs.

_____

A van Niekerk JA

Savage ADJP *et* Jolwana AJA concur.

APPEARANCES:

FOR THE APPLICANT:	Adv P Schumann Instructed by Harkoo, Brijlal and Reddy Attorneys
FOR THE FIRST RESPONDENT:	Mr D Farrell Farrell Inc Attorney

LABOUR APPEAL COURT