



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1233/21

In the matter between:

ASSMANG (PTY) LTD t/a BLACK ROCK MINE

Applicant

and

MOSES MOYO

First Respondent

NATIONAL UNION OF MINeworkERS (NUM)

Second Respondent

DAVID PIETERSEN N.O.

Third Respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

Fourth Respondent

Heard: 22 April 2025

Delivered: 13 August 2025

JUDGMENT

ENGELBRECHT, AJIntroduction

[1] This is an application pursuant to section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award issued by the third respondent (Commissioner) on 26 May 2021 (Award). The Commissioner found that the dismissal of the first respondent (Mr Moyo) for a serious breach of rules and gross dereliction of duty was substantively unfair and ordered his retrospective reinstatement. The applicant (Assmang) was permitted to conduct a new disciplinary inquiry and to impose a sanction less severe than dismissal.

[2] Succinctly summarised, Assmang argues that the Commissioner misconstrued the nature of the enquiry before him and arrived at a conclusion that no reasonable decision-maker could have on the evidence presented. This is claimed to constitute a gross irregularity. Assmang further contends that the Commissioner exceeded his powers.

Relevant facts

[3] Assmang is a mining company. Its operations include Black Rock Mine in the Northern Cape, where it extracts manganese ore. The Black Rock Mine operations comprise the Gloria and Nchwaning 2 and 3 underground mining complexes.

[4] Assmang initially engaged Mr Moyo's services on 20 April 2005. By the second half of 2020 – the period relevant to these proceedings – he was employed as a Supervisor of Operational Logistics (Logistics Supervisor), and it appears that until 22 June 2020, he was usually based at Nchwaning 2, and thereafter at Gloria. Mr Moyo's duties include supervising utility operators and transportation. In his capacity as Logistics Supervisor, Mr Moyo was authorised to sign and issue so-called Gate Releases and was supplied with Gate Release Booklets. Gate Releases are issued to facilitate the transportation of materials through security gates.

¹ Act 66 of 1995, as amended.

[5] Every time an employee receives a Gate Release Booklet, they must sign an acknowledgement of receipt of Assmang's Gate Release Authorisation Rules (Rules). On at least four occasions, Mr Moyo received a Gate Release Booklet and was required to sign such an acknowledgement. For example, Mr Moyo signed this acknowledgement on 13 May 2019. The Rules specify that Gate Release Booklets are to be collected at Assmang's Asset Protection offices, and a register must be signed to receive a booklet with a specific set of serial numbers. The Rules clearly state that "*The booklet will always be under direct control of the authorised person. When not in possession of the authorised person, the booklet will be locked away in a safe place*". Any loss or theft of a Gate Release Booklet must be reported immediately.

[6] In argument before this Court, Mr van As, who appeared for Assmang, emphasised that the rationale for the Rules is clear. Mining operations require substantial investment and advanced technologies, and they produce valuable outputs. Consequently, mining activities are vulnerable to safety and security threats. Trespassing, illegal mining, and theft of minerals and equipment are genuine concerns. Access control and effective security measures are crucial to safeguarding the assets of mining companies. Mr Harms, who testified for Assmang before the Commissioner, stated, "*if you sign for a gate release book it is like you sign for a cheque book*", i.e., a person with access to the Gate Release Booklet is comparable to someone having access to a blank cheque. In line with this recognition of the importance of controlling the Gate Release Booklet, Mr Moyo testified that he was placed in a position of trust, accepting that not all supervisors received Gate Release Booklets, and that he was among a select few.

[7] In recognition of Assmang's emphasis on proper access control and security measures, its Security, Access Control and Search Procedure (Procedure) is comprehensive in detailing procedures for gate releases of goods transported both within different sections and outside Assmang's operations. Strict controls are specified for issuing Gate Release Booklets and their usage, and it is evident that the Procedure requires security personnel not only to accept gate releases at face value but also to verify their authenticity and legitimacy.

[8] Against this backdrop, the events surrounding the charges made against Mr Moyo are examined.

[9] From 22 June 2020, Mr Moyo was stationed at Gloria, which is approximately five to eight kilometres from Nchwaning 2. During the period from 22 to 29 June 2020, at certain times, Mr Moyo arranged with a colleague to leave his Gate Release Booklet in an unlocked steel cabinet locker at Nchwaning 2, permitting him and others to access it. This was because Mr Moyo did not have a locker at Gloria to secure his belongings. Assmang's Asset Protection Unit had not been informed of this arrangement. Subsequently, somewhere between 6 and 10 July 2020, the Gate Release Booklet was returned to Mr Moyo's possession at Gloria, after he requested a gate controller to bring him the Gate Release Booklet.

[10] These facts came to light during an investigation when a gate release from the Booklet issued to Mr Moyo was used in an attempted theft by an alleged syndicate involved in the unauthorised removal of Assmang property. Specifically, on Sunday, 9 August 2020, an employee in the Assmang security department was informed of a bakkie occupied by contractor employees, loaded with wooden pole offcuts, attempting to exit through a boom gate. They possessed gate release documents purportedly issued by Mr Nel, but the investigation revealed that these documents originated from Mr Moyo's Gate Release Booklet, not Mr Nel's. Mr Moyo conceded that the syndicate might have obtained his Gate Release Booklet during the period when it had been left unsecured. Those involved in the attempted physical removal of the goods informed the investigator that the book was "*lying around*".

[11] Since irregularities in the gate release were detected, the property was not removed, and Assmang did not incur a loss on that occasion. Nonetheless, the subsequent investigation revealed that Mr Moyo had breached the Rules, thereby exposing Assmang to a risk. As Mr Harms testified in cross-examination, "*If the gate release book was properly locked up, this incident would never have occurred. If the gate release book was kept in a safe place, illegal access to the book would never have occurred*". Furthermore, before the attempted removal of the wooden poles on 9 August 2020, Mr Moyo was in possession of his Gate Release Booklet (having

received it in early July). Although he had stored the Gate Release Booklet in an unlocked locker for a period of time, he allegedly did not notice, and in any event did not report, that there appeared to have been irregular use of his Gate Release Booklet, with two gate releases obviously having been taken out. The investigator concluded that Assmang should take disciplinary action against Mr Moyo for gross negligence.

[12] Employee Relations became involved in formulating the charges, and on 2 October 2020, Mr Moyo was charged with “*Serious Breach of Gate Release Authorisation Rules*” and gross dereliction of duties. A disciplinary enquiry then took place, and Mr Moyo was found guilty of a serious breach of the Rules. The Chairperson recommended dismissal as the appropriate sanction. Mr Moyo appealed unsuccessfully and was subsequently dismissed.

[13] Mr Moyo filed an unfair dismissal dispute with the Commission for Conciliation, Mediation and Arbitration (CCMA). Conciliation was unsuccessful, and the dispute was then referred to arbitration.

[14] The matter came before the Commissioner, who received evidence from Assmang’s investigation officer, the security company’s Security Administration Manager, and both Assmang’s General Engineering Supervisor and Employee Relations Officer – with the former having chaired the original disciplinary inquiry. Mr Moyo testified in support of his case.

[15] Ultimately, the Commissioner had to decide whether the dismissal was fair.

[16] The Commissioner found no evidence that Mr Moyo was part of a syndicate. Addressing the charges collectively, he accepted that Mr Moyo had been negligent in leaving the Gate Release Booklet unattended and that he could have taken greater care to prevent it from falling into the wrong hands. The Commissioner concluded that Mr Moyo breached certain valid and reasonable rules, which he was aware of and that Assmang had consistently enforced, because Mr Moyo failed to secure the Gate Release Booklet from persons not authorised to issue gate releases. He recorded that “*It is clear from the rules of the respondent that a peremptory duty*

existed on Mr Moyo to secure the booklet from persons who do not have authority to issue the gate releases contained in it. It is accordingly my finding that based on Mr Moyo's admission to negligence, that he is indeed guilty of having breached clauses 3 and 4 of the respondent's Gate Release Rules".

[17] However, the Commissioner concluded that dismissal was not an appropriate penalty in these circumstances, considering that it was Mr Moyo's first offence, the attempted theft was prevented, and there was no proven connection between the negligence and the attempted theft. He also observed that there was no evidence suggesting that the trust relationship between Assmang and Mr Moyo had broken down or that ongoing employment had become intolerable. As a result, the Commissioner found that the dismissal was substantively unfair, ordered Mr Moyo's retrospective reinstatement, and awarded eight months' backpay. Additionally, he directed that Mr Moyo's case be referred back to a disciplinary hearing for the imposition of a sanction less severe than dismissal.

The basis for review

[18] In support of its review, Assmang contends that the Commissioner faced evidence of a serious breach of the Rules that admittedly amounted to misconduct. Assmang argues that the conduct, which is undisputed, represented a gross dereliction of duty rather than mere negligence. Furthermore, it emphasises the lack of genuine remorse and Mr Moyo's failure to recognise the potential for loss that Assmang suffered as a result. According to Assmang, Mr Moyo should be held accountable for his breach of the Rules. Additionally, Assmang asserts that the Commissioner was not required to determine whether Mr Moyo was negligent, but whether his conduct amounted to a gross dereliction of duty. His focus on negligence, so Assmang submits, indicates a misunderstanding of the relevant enquiry, and his emphasis on the absence of loss suggests that irrelevant considerations were taken into account, because the issue was the control of the Gate Release Booklet and not the loss suffered as a consequence of a breach of the Rules.

The test

[19] In the assessment of the review, this Court is enjoined to consider not only the reasons that the Commissioner gave in issuing the Award, but also to take into account the evidence before the Commissioner in its entirety.² This is an objective determination.³ As the Labour Appeal Court (LAC) explained in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*:⁴

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable.’

[20] Importantly, for a review to succeed, this Court must determine that any failure or error of the Commissioner relied upon must result in an unreasonable outcome. Therefore, even if a failure or error is shown to exist, Assmang must also demonstrate that the outcome reached was unreasonable. If the outcome is reasonable despite the Commissioner's failure or error, the review application would be dismissed.⁵

[21] Redding AJ usefully summarised the role of the Court in *Telkom SA SOC Limited v Commission for Conciliation, Mediation and Arbitration and others*⁶ (*Telkom SA*):

‘From the authorities it is now clear that a review court is not so much concerned with the reasoning of the CCMA arbitrator in coming to his or her decision as the reasonableness of the decision. The main question is whether the arbitrator's finding that the sanction of dismissal was too severe and therefore unfair is so unreasonable that a reasonable arbitrator could not reach that result on the evidence before him or her. This is a not an insubstantial hurdle.’⁷

² *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others (Fidelity)* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 102.

³ *Fidelity* above at para 103.

⁴ [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).

⁵ See *South African Breweries (Pty) Limited v Long and others*; *South African Breweries (Pty) Limited v Long and others* [2019] JOL 41188 (LC) at para 35. The Constitutional Court upheld the judgment in *Long v South African Breweries (Pty) Ltd and others* [2019] 6 BLLR 515 (CC); (2019) 40 ILJ 965 (CC).

⁶ [2021] JOL 55280 (LC); [2021] ZALCJHB 238.

⁷ *Ibid* at para 12.

[22] Regarding reasonableness, the LAC in *National Bargaining Council for the Road Freight & Logistics Industry v Deyssel NO & others*,⁸ referencing the review test established in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,⁹ as discussed in commentary thereon,¹⁰ observed:

‘The “threshold of reasonableness” established by the judgment recognises that in relation to the penalty of dismissal, value choices may differ in relation to the same factual matrix but nonetheless fall within a range of decisions to which a reasonable decision-maker could come. The metaphor of an elastic band has been usefully employed to illustrate the applicable threshold – the function of the review court is to determine the point to which the elastic of reasonableness can stretch without snapping.’

Analysis

[23] The central question before this Court is whether Assmang has satisfied the “*not insubstantial*” threshold of demonstrating that the Commissioner’s conclusion that dismissal was an excessively harsh sanction in the circumstances was so unreasonable that no reasonable decision-maker could have reached that view. Could it demonstrate that the proverbial elastic band of reasonableness broke in the particular circumstances?

[24] The assessment of these questions requires consideration of the factors to be taken into account when evaluating the fairness of the sanction. This Court is guided by the judgment in *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal & Engineering Industries Bargaining Council & others*,¹¹ where it was reasoned:

‘[33] ... In deciding the reasonableness or otherwise of an award in this regard, a court of review must take the following considerations into account: firstly, the duty to determine whether a dismissal is fair or not rests with the commissioner. ‘The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not.

⁸ (2025) 46 ILJ 1679 (LAC); [2025] 8 BLLR 790 (LAC).

⁹ [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at para 31.

¹⁰ Myburgh ‘Reasonableness Review – the Quest for Consistency’ (2024) 45 ILJ 1377 at 1379.

¹¹ (2011) 32 ILJ 1057 (LAC); [2010] ZALAC 25 at paras 34 – 35.

Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view.' (*Sidumo* at para 75.) To this extent a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant circumstances. (*Sidumo* at para 79).

[34] Secondly, the decision whether or not the sanction imposed by an employer is fair in a particular case is a value judgment which the commissioner is required to make on the basis of his/her own sense of fairness. Thirdly, each case must be decided on its own merits and with due regard to the totality of the circumstances – an objective approach (*Sidumo* at paras 64 and 68). In doing so the commissioner will 'necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed a sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long service record. This is not an exhaustive list.' (*Sidumo* at para 78). Other factors may include the seriousness of the misconduct and the gravity thereof with relation to the continued employment relationship as well as the employee's previous disciplinary record and personal circumstances, the nature of the employee's job and the circumstances of the infringement. The list is not exhaustive.'

[25] The evidence presented before the Commissioner in the current case was clear: (i) Assmang has a rule regarding the safekeeping of the Gate Release Booklet; (ii) this rule is significant given the security risks faced by the mine, which was demonstrated by an attempted theft resulting from a breach of this rule; (iii) Mr Moyo was aware of the rule; (iv) even if Mr Moyo considered that there might be difficulties in safeguarding the Gate Release Booklet, he did not consult the Asset Protection office about his proposed solution, which introduced a risk; (v) failing to adhere to the rule in this case exposed Assmang to risk, despite the thwarted theft; and (vi) since Mr Moyo held a trusted position, his breach of the rule eroded the trust relationship.

[26] In light of those facts, the Court is mindful of the exposition of Justice Prinsloo in *National Union of Metalworkers of SA & another v Commission for Conciliation, Mediation & Arbitration & others*¹² (the *Lumka* case): “an employee is obliged to act to protect the interests of the employer and when the employee fails to do so and the failure constitutes serious misconduct, the sanction of dismissal will be fair, as an employer is entitled, as an operational imperative, to rely on its employees to act in good faith and to protect the interests (which includes property) of the employer. In such a case, dismissal becomes an operational imperative and way of managing risk”.¹³ This, on the basis of the LAC’s explanation in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹⁴ (*De Beers*) that “Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer’s enterprise”.

[27] Mr Moyo was charged with breaching the Rule, which was alleged to constitute a gross dereliction of duty. The concept of dereliction of duty “implies deliberate or wilful action on the part of the employee”,¹⁵ not mere negligence.

[28] In this case, there was a deliberate decision to leave the Gate Release Booklet in an unsecured locker, thereby exposing Assmang to the serious risk that items could be removed from its operations by persons unauthorised to do so. Although the evaluation of the evidence does not suggest Mr Moyo was actuated by malice, the circumstances in which the Rule was breached imply that Mr Moyo was at least grossly negligent: it was an instance of “conscious risk-taking, complete obtuseness of mind or... a total failure to take care”, and “departure from the standard of the reasonable person to such an extent that it may properly be

¹² (2023) 44 ILJ 1575 (LC); [2023] JOL 60529 (LC).

¹³ *Lumka* case at para 54.

¹⁴ (2000) 21 ILJ 1051 (LAC); [2000] JOL 6467 (LAC) at para 22.

¹⁵ *Telkom SA supra* at para 6.

categorised as extreme", as described by the Supreme Court of Appeal in *Transnet Ltd t/a Portnet v The Owners of the Mv "Stella Tingas" and another*.¹⁶

[29] Does this imply that the Commissioner erred? Before reaching such a conclusion, further considerations must be taken into account, as follows:

29.1. The evidence before the Commissioner was equally clear that Mr Moyo had, until the incident that formed the basis for disciplinary action in the present case, maintained a clean disciplinary record.

29.2. Moreover, this is not a case comparable to *National Petroleum Refiners (Pty) Limited v National Bargaining Council for the Chemical Industry and others*¹⁷ where the now Judge President of this Court was confronted with an award where the Commissioner placed excessive emphasis on mitigating factors in a case involving alleged gross dereliction of duty due to gross negligence, which created a safety hazard and caused damage worth tens of millions of Rands. Indeed, Assmang suffered no loss at all because the security procedures prevented any loss resulting from the irregular use of the gate release.

29.3. Furthermore, no evidence could be provided regarding the specific circumstances under which the perpetrators of the attempted theft acquired the Gate Release, leading to questions about the link between "*negligence*" and the attempted theft.

29.4. Another individual, whose vehicle was involved in the attempted theft, had not even been found guilty.

29.5. Finally, Mr Moyo cooperated with the investigation and even admitted to negligence, which could suggest remorse.

[30] On these aspects, the Court considers as follows:

30.1 A clean disciplinary record alone does not mean dismissal is an unfair penalty. Dismissal for a first offence can be suitable when the misconduct is serious.

30.2 It is irrelevant to the determination of the appropriateness of the sanction whether any loss was suffered. As discussed earlier, with reference

¹⁶ [2003] 1 All SA 286 (SCA); 2003 (2) SA 473 (SCA) at 290-1.

¹⁷ [2014] JOL 31911 (LC); [2013] ZALCJHB 280.

to the *Lumka* case, an employer has the right to expect an employee to protect its property. The Gate Release system exists to prevent loss, and it functioned effectively in this case because the irregularities with the Gate Release were identified. However, this does not diminish the clear evidence that Mr Moyo's intentional decision to leave the Gate Release Booklet in a place accessible to anyone put Assmang's property at risk. Without the vigilance of the security personnel, damage could have occurred. The issue is not about the loss itself but the risk, as emphasised by the LAC's judgment in *De Beers*. Dismissal, as an operational measure in risk management, may be appropriate even if no actual loss has occurred.

30.3 The significance of the *connection* between the attempted theft and Mr Moyo's conduct should not be exaggerated. According to Mr Moyo's own account, the Gate Release Booklet might have been accessed by the perpetrators while he had arranged for the locker to remain unsecured. Mr Moyo does not need to have been proven to be part of the alleged syndicate to conclude that he violated the Rule and deliberately flouted an obligation placed on him. Mr Moyo was responsible for controlling a specific set of Gate Releases stored in the form of a Gate Release Booklet. The Gate Release used in the attempted theft came from the Booklet issued to Mr Moyo. There are only two plausible explanations for how the perpetrators accessed the Gate Release: either Mr Moyo handed it to them, or they accessed the Booklet because Mr Moyo failed in his duty to keep it secure. Assmang's case relied on the second explanation. That represents the connection.

30.4 Consistency in the treatment of different persons involved in the attempted theft is irrelevant. The evidence before the Commissioner did not include any specific identification of the charge that the employee who escaped sanction faced, nor what led to him being found not guilty. What is clear, however, is that the employee in question did not face the same charge as Mr Moyo. The charges against Mr Moyo were unique because it was his Gate Release Booklet that had been left unsecured, and it was a Gate Release from his Booklet that was used in the attempted theft. His misconduct was not comparable.

30.5 Mr Moyo's cooperation with the investigation and his reluctant admission that his actions could be described as negligent do not constitute

evidence of remorse. The admission of negligence, as it was, was not clear-cut. Among other evidence he provided, Mr Moyo stated that “*But for the mere fact that someone got hold of the book, that is not negligence*”. Before the Commissioner, he attempted to deflect responsibility and failed to fully acknowledge that his arrangement to leave the Gate Release Booklet unsecured gave the perpetrators an opportunity to access it. Furthermore, he claimed that “*I never broke the rules*”, relying on the fact that, on 9 August 2020, the Gate Release Booklet was purportedly kept under lock and key. He also testified that he believed Assmang “*concocted*” the charges. Overall, the evidence does not support the conclusion that Mr Moyo was remorseful.

[31] This exposition highlights errors in the Commissioner’s reasoning. The main question then remains: if we accept that the Commissioner’s reasoning contains errors, were those errors reviewable for rendering the outcome unreasonable? This involves examining the potential distortion caused by those errors on the final result. As the Court explained in *Head of Department of Education v Mofokeng & Others (Mofokeng)*,¹⁸ the LAC’s *locus classicus* on reviews:

‘Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome... 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 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. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable.’

¹⁸ (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at para 33.

[32] In the view of this Court, the Commissioner's treatment of the evidence regarding, for example, Mr Moyo's remorse, did indeed have a distorting effect. Similarly, his asking the "*wrong question*"—specifically, whether there had been a loss or if Mr Moyo had been linked to the syndicate—was inappropriate because those considerations were irrelevant to guilt. The Commissioner concluded that the Rules had been broken. The evidence before him showed that Mr Moyo had deliberately decided to leave the Gate Release Booklet unsecured. This was critical because the Rule requiring the Gate Release Booklet to be kept safe is so important that an employee must sign an acknowledgement of that Rule (and others) each time a Gate release Booklet is issued. Shifting the focus from there to assessing the appropriateness of the dismissal solely on the basis of negligence significantly distorted the analysis. The distortion was so profound that the Commissioner overlooked Mr Moyo's position of trust (which he acknowledged), and consequently ignored how breaching that trust affected the acceptability of continuing employment.

[33] In light of *Mofokeng*, given this distorting effect, the only question that remains is whether the result – that the dismissal was held to be unfair, reinstating Mr Moyo, and allowing for a fresh disciplinary hearing to impose a sanction for negligence – is nonetheless capable of reasonable justification. That question must be approached with care, because the LAC in *Makuleni v Standard Bank of SA (Pty) Ltd & others*¹⁹ warns against the Court yielding to "*the seductive power of an argument that the result could be different*" and demands that the review only be granted if the conclusion reached is "*untenable*".

[34] In the view of this Court, the outcome is "*untenable*" and therefore unreasonable. No reasonable decision-maker, faced with evidence of a calculated decision to leave the Gate Release Booklet unsecured, in breach of an important rule, would conclude that Mr Moyo was merely negligent. Similarly, ordering Assmang to reinstate Mr Moyo after he deliberately violated a key security rule, and then limiting disciplinary action to an assessment of a negligence sanction, is untenable. It is clear that the trust relationship had been broken, and it was

¹⁹ (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC).

unreasonable to expect Assmang to reinstate Mr Moyo in a position of trust, especially since his characterisation of his deliberate breach of the Rule as possible negligence only demonstrated a significant failure to grasp the seriousness of his actions. In this case, the outcome is not justifiable given the full context and evidence. The elastic band of reasonableness has snapped.

[35] As a result, the Award must be reviewed and set aside. This Court, having the benefit of the complete transcripts of the evidence and documentation presented before the Commissioner, is in a position to substitute its own order for that of the Commissioner, and the relief granted reflects this assessment.

Costs

[36] In its notice of motion, Assmang sought costs in this application. Mr van As did not press for costs in his submissions before me. I will not make any costs order. This is also consistent with the approach that this Court does not make costs orders except in exceptional circumstances.

[37] In the circumstances, I make the following order:

Order

1. The Arbitration Award issued by the Third Respondent under the auspices of the Fourth Respondent, under case number NC2717-20 on 26 May 2021 (Award), is reviewed and set aside.
2. The order in the Award is substituted with the following order:
“The dismissal of the First Respondent was fair”.
3. There is no order as to costs.

MJ Engelbrecht
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

MJ van As

Instructed by:

Cliffe Dekker Hofmeyr Inc

For the First and Second Respondent: Mohale Incorporated