

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2424/21

In the matter between:

SIBANYE GOLD PROTECTION SERVICES (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

MOOI. F. N.O

Second Respondent

NUM OBO MAKGOE

Third Respondent

Heard: on the 24 April 2024 but mostly decided on the Papers.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be on 7 May 2024.

JUDGMENT

NTSOANE, AJ

Introduction and background of the issues

[1] This is an opposed review application brought by the applicant in terms of section 145 of the Labour Relations Act¹ (LRA) for an order to review and set aside an arbitration award dated 19 October 2021, issued by the second respondent

¹ Act 66 of 1995, as amended.

(Commissioner) under the auspices of the first respondent the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GAJB8332-21.

[2] It stands testament from the arbitration award which forms the primary subject matter of this review that the third respondent (union), from inception, has been acting on behalf of its member and for purposes of this judgment and ease of reference, the employee will herein be referred to as Makgoe. It is common cause that Makgoe was charged for sleeping on duty on 19 December 2020 and consequently summoned to a disciplinary hearing which he duly attended. Makgoe was then dismissed from his employment when he was imposed with a sanction of a dismissal following such disciplinary hearing.

[3] Disgruntled by the said dismissal, the third respondent then referred an unfair dismissal dispute to the first respondent and an arbitration hearing came before the second respondent. The main issue which the Commissioner was called to determine, was only the substantive fairness of Makgoe's dismissal. The arbitration was heard over two days and following extensive ventilation of the issues, the Commissioner ordered retrospective reinstatement of Makgoe with effect from the 26th of April 2021 being the date of his dismissal and back pay in the amount equivalent to six months' salary. The applicant is clearly displeased with the Commissioner's arbitration award and sought to invoke the process in terms of section 145 of the LRA to have the said award reviewed and set aside.

[4] Makgoe was employed by the applicant in the capacity of a Security Guard and his main role comprised of patrolling and guarding the premises of the applicant and also doing random employee searches. From the pleadings filed by the respective parties, it appears to be a common cause that there was a recent breach at Sibanye Gold Plant during which suspects cut through the perimeter fence to enter the plant in order to steal gold. Sibanye had implemented a protocol in terms of which guards would patrol the area on a 24/7 basis and a patrol car was specially dedicated to patrol and ensure that the area was protected in an attempt to curb any further breach.

[5] Makgoe was assigned to be part of the patrol team and on 19 December 2020, he was assigned specifically to stand guard on the said site which the applicant considers as “high risk”. How Makgoe came to face a disciplinary hearing was when the applicant through Mr Miyelani Mathebula (Mathebula) and Mr Martin Botes (Botes) both employed by Sibanye, also on duty on the same night of the 19th of December 2020, spotted a vehicle that was parked at the high risk area with headlights on. It is alleged that on approaching the vehicle with no signs of movement, the two gentlemen could see that Makgoe had reclined his driver's seat and he was sleeping. Makgoe was awakened by the movement of the two gentlemen when Botes switched on his torch in an attempt to take pictures of the sleeping Makgoe. It is further alleged that Makgoe apologised to the gentlemen for having slept in the vehicle and on duty.

[6] The dominant and specific events of that night leading to the dismissal of Makgoe were significantly and generally placed in dispute especially the fact that Makgoe had reclined his seat and was sleeping when he was found.

[7] This alleged transgression was reported to management and this is how Makgoe was charged, summoned to a disciplinary hearing and subsequently dismissed. This dismissal, is sanctioned against Makgoe despite the chairperson of the disciplinary hearing having found that Sibanye did not lead sufficient evidence for him to recommend a sanction of a dismissal and accordingly issued Makgoe with a final written warning. The sanction was referred to Sibanye's internal review which process found that the sanction imposed by the chairperson of the disciplinary hearing, was not in line with the provisions of Sibanye's disciplinary code as it prescribes that sleeping on duty was a dismissible offence. Sibanye opted to rather substitute the chairperson's sanction by elevating same to a dismissal one.

Grounds for review

[8] The first ground of review in this regard pertains to the inspection *in loco* which was conducted by the parties. The applicant avers that the Commissioner committed an irregularity when he based most of his findings on his personal observations and photographs taken during the inspection *in loco*. The applicant

submits that the Commissioner should have allowed the parties an opportunity to comment on his observations during the inspection *in loco*.

[9] The applicant further contends in its second ground for review that, the Commissioner has committed an irregularity in the conducting of the arbitration proceedings when he made an adverse finding against all the applicant's evidence on the basis that there were inconsistencies.

[10] The third ground for review raised by the applicant is that the Commissioner had committed an irregularity when he failed to properly consider the totality of the evidence that was placed before him.

[11] The fourth ground for review was that the Commissioner had committed a gross irregularity when he found that the chairperson of the disciplinary hearing had doubted Makgoe's guilt.

[12] The third respondent generally agrees with the determination of the Commissioner and submits that the grounds for review are ill-founded and are not sustainable in fact and in law.

The test for review

[13] The grounds for review for arbitration awards are stipulated in Section 145 of the LRA. In the case of *Sidumo and another v Rustenburg Platinum Mines Ltd and others*² (*Sidumo*), the Constitutional Court held that section 145 is suffused by the constitutional standard of "reasonableness". The Court in *Sidumo* subsequently confirmed that the standard of review is whether the decision reached by the CCMA Commissioner is one that a reasonable decision maker could not reach. The Court in the case of *Shoprite Checkers vs Ramdaw NO*³ held that public power must be exercised rationally and therefore a decision made by a public agency must be rationally related to the purpose the decision making power was given. In addition

² [2007] 12 BLLR 1097 CC; (2007) 28 ILJ 2405 (CC).

³ [2001] BLLR 1011 (LAC); (2001) 22 ILJ 1603 (LAC).

thereof, and in *CUSA v Tao Ying Metal Industries and others*⁴ (*Tao Ying Metal Industries*) O'Regan J held:

'It is clear... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[14] What the Constitutional Court meant in *Sidumo* and *Tao Ying Metal Industries* was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable. This review test was considered and applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others (Fidelity Cash Management Service)*⁵ where the Court said the following:

'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

[15] As to what would be considered to be unreasonable, the Court in *Fidelity Cash Management Service* held as follows:⁶

'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the

⁴ [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC) at para 134.

⁵ [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) at para 96.

⁶ Ibid at para 97.

commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach...'

[16] The Court in *Fidelity Cash Management Service* then went further and formulated this outcome based review test which the Court considered the *Sidumo* review test envisaged, where the Court said:⁷

'It seems to me that there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[17] The Court in *Fidelity Cash Management Service* then concluded:⁸

'... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

[18] What the judgment of *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*⁹ means is simply that if the Commissioner ignored material evidence, and the review

⁷ Ibid at para 102.

⁸ Ibid at para 103.

court in considering this material evidence so ignored together with the case as a whole, believes that the arbitration award outcome cannot still be reasonably sustained on any basis, then the award would be reviewable. The Court again in this case specifically considered the *Sidumo* test, and concluded as follows:¹⁰

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

[19] I am now, in view of all these cases laying the test for review, inclined to intensively conduct a review enquiry in order for me to be in a better position to determine if irregularity, which warrants the award to be set aside, occurred. I will then interrogate the evidence holistically presented before the Commissioner in order to establish if there is any irregularity. If, in conducting this enquiry, I find that there is no irregularity in the first place, the matter is at an end, no further determinations need to be made, and the review must fail. However, should I find that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. If I were to put it differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? In conducting this second step of the review enquiry, the review court needs not to concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was

⁹ 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA), as per Cachalia and Wallis JJA.

¹⁰ Ibid at para 25.

already considered in deciding whether an irregularity existed in the first part of the test.

[20] This Court has emphasised that the decision in *Sidumo and another v Rustenburg Platinum Mines Ltd and others (Sidumo)*¹¹ does not mean “...that the grounds of review in section 145 of the Act are obliterated [but]... that they are suffused by reasonableness”.¹² In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others (Gold Fields)*¹³ it was stated that:

‘...where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.’¹⁴

Determination

[21] In determining whether the Commissioner’s arbitration award stands to be reviewed and set aside, I am inclined to simultaneously consider the findings in the award, the evidence led at the arbitration and the grounds for review so as to establish if the outcome thereof will lead me to conclude that any reasonable Commissioner faced with the same facts as the second respondent would have arrived at the same findings.

Commissioner’s personal observations and photos taken from inspection in loco

[22] There is no question that there was an inspection *in loco* conducted by the parties at least on two occasions being during the disciplinary hearing (the first) and again during arbitration (the second). The first inspection *in loco* is covered and dealt with quite substantially during the arbitration proceedings. During the arbitration

¹¹ [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC).

¹² See *inter alia Fidelity Cash Management Service v CCMA and others* [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) at para 101.

¹³ [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) with reference to *Sidumo*.

¹⁴ *Ibid* at para 14. With reference to s145(2)(i), (ii) and (iii) of the LRA.

proceedings, there was a second inspection *in loco* conducted by the parties and it was during this process that the Commissioner in fact made some personal notes and took photos. This is recorded in paragraph 63 of the Commissioner's award and the transcript itself.

[23] I must commence by indicating that, it might be so that the applicant is correct in its submissions that the Commissioner in his award, placed a significant reliance on personal observations and photos taken during the second inspection *in loco* and this is despite the Commissioner's omission to afford the parties the necessary opportunity to comment on his observations as well as his photos. However, there is simply nothing that seems to portray any material difference in the actual evidence led as far as the first inspection *in loco* is concerned. I smoothly deal with this.

[24] Whilst Mathebula was extensively cross-examined on the observations or findings from the first inspection *in loco* and he was superficially very evasive in his answers, Botes on the other hand was not part of the said inspection *in loco* thus could not testify to it. Mathebula accepts that he was there at the first inspection *in loco* and in fact, went into the vehicle so as to establish if a person could be seen from the inside out but could not remember if he was the only person that went into this vehicle. He also could not challenge pertinent versions put to him that Makgoe's representative also went in and the ER officer also went in. He also could challenge that someone who was inside could not be seen or it could not be determined if the person is sleeping or not. During his cross-examination, his credibility was brought into serious question and he answered the following, on pages 30, 31 and 62 of the transcript:

'APPLICANT'S REP: Can you tell the Commissioner why was that done?

MR MATHEBULA: They wanted to see if they can be able to see someone sleeping inside the vehicle.

APPLICANT'S REP: So now, earlier on you answered the question. You said you went into the vehicle there was nothing that was communicated. Meaning you are not sure whether they could see you inside the vehicle or not.

MR MATHEBULA: I do not know, they did not say. They just said let's go back to the boardroom and then we went back to the boardroom. So I do not know.

APPLICANT'S REP: Through you Commissioner, what will be your answer if I said it

was not proven that the person cannot be seen inside the vehicle sleeping because of the steel plates and the tinted windows, as you do not know anything you were not told anything

MR MATHEBULA: Yes I was not told anything so I cannot answer something that I was not given a feedback, we can see you, we cannot see you.

MR MATHEBULA: Hence I am saying I cannot deny that one but I cannot recall. What I recall is I went inside the vehicle.

APPLICANT'S REP: Okay since you cannot deny it, were you able to see the person that was inside the vehicle while you were outside?

MR MATHEBULA: Hence I am saying I cannot recall if someone went in but what I recall is I went inside the vehicle.

APPLICANT'S REP: But are you aware that the purpose was to prove if the applicant was sleeping or not inside the vehicle.

MR MATHEBULA: Yes, that is why I went inside the vehicle.

APPLICANT'S REP: So the question is that now that you said that you did this, you were part of this demonstration, but you cannot tell the Commissioner if it was possible that you can see the person inside and you cannot say that, according to your evidence.

MR MATHEBULA: I am saying I cannot recall if someone went but you can see if someone is sleeping inside.

MR MATHEBULA: That is correct, nothing was communicated to me. We went inside to the boardroom.

APPLICANT'S REP: Seeing that you do not deny that other people went in, you did not see any need for you to see if the person that is in can be identifiable whether he is sleeping or not.

MR MATHEBULA: Ja, because they found what they were looking for, that is why I did not question if they managed to see me or not. I went there, got inside the seat and then went back to the boardroom.'

[25] Even if I were to accept that the Commissioner has committed an irregularity by not affording the parties an opportunity to question his photos, observations and findings during the second inspections *in loco*, which I do with a pinch of salt, Mathebula's cross-examination as far as the first inspection *in loco* is tantamount to a fatal bullet fired towards the applicant's case. This ground for review stands to fail

as it is not sustainable on the evidence presented at the arbitration hearing. The point is that, a person could not be seen from the inside out of this vehicle and this then brings Mathebula and Botes' evidence into serious question whether they saw Makgoe sleeping, especially when both inspections *in loco* were conducted during the day versus their encounter with Makgoe which took place at night. The Commissioner's omission does not change anything; in fact, the essence of the inspection *in loco* (being it first or second) was fully covered during the arbitration hearing and this left the applicant's case with big holes to fill. Put it differently, this Court may for fairness purposes, set aside the second inspection *in loco* and leave the first inspection *in loco* which once again, was extensively covered in the arbitration proceedings, the applicant's case still does not become better.

Credibility finding against Sibanye's evidence

[26] Both Mathebula and Botes were not credible witnesses and it is on this basis that the applicant's review stands to fail. Makgoe's testimony at the arbitration resonates with someone who had reflected on the events that had taken place and sought to restructure the events or fill up the open holes. In his evidence, Mathebula was questioned quite extensively about why most of his findings during the night in question, were not contained in his written statement and his responses were incredible in that:

26.1 Mathebula was asked why Makgoe would wake up on the flash of a phone and not wake up when blasted with the headlights of a vehicle which are bigger and brighter and he said he did not know if it was because of the flashlight. This is inconsistent with the applicant's submission that Makgoe was awakened by the cellular phone flashlight;

26.2 Mathebula further conceded that it is not the applicant's procedure to flick the vehicle lights, hoot or call on the radio. He further conceded that the applicant has never communicated to its employees that whilst this is not a standard procedure, they must nonetheless do it when working in a high risk area. This is in addition to the fact that this piece of evidence was not contained in his statement.

26.3 Mathebula also accepted and conceded that his statement does not

contain the fact that Makgoe was approached from the front, they parked parallel to him and when they tried to take pictures of him sleeping, he woke up. His statement also does not contain the fact that he and Botes were there for about 5 minutes before Makgoe could wake up.

26.4 Mathebula could not point out where he had indicated in his statement that Makgoe had apologised to them simply because this pertinent piece of evidence was, for unknown reasons, left out to the detriment of Mathebula's credibility. This is exceptionally pertinent to be left out, especially because the applicant seems to be placing a heavier reliance on this. He responded by stating "*I did not write it in my statement*". A person who tenders an apology to an incident is a person who is naturally admitting guilt hence this is extraordinarily important;

26.5 Mathebula further conceded that upon finding Makgoe sleeping, this was not reported in the pocket book of Makgoe despite this being a standard procedure. In his own words, "*I did not sign his pocket book*". He also did not record this in the site occurrence book and his omission is in direct contravention of the applicant's standard procedure. Once again, this corroborates my view that Mathebula's evidence at the arbitration hearing was an attempt to close the loopholes that were realised from the disciplinary hearing;

26.6 The applicant accepts and in fact insists that Makgoe was working in a high risk area however following all that had happened and Mathebula alleging to have found Makgoe sleeping, the applicant inadvertently omitted to submit the video footage covering the high risk area. This is despite the fact that the area is under 24/7 surveillance. In his response, Mathebula states that he did not bring the video footage because he had enough evidence. The question remains, what evidence?

26.7 Mathebula could not show the Commissioner the online report about the incident and this is the same determination made by the chairperson of the disciplinary hearing that the applicant's case was significantly lacking material evidence – "*yes there is no online*". There were also no photos presented both at the disciplinary hearing and the arbitration.

[27] Botes on the other hand, did not testify much. In terms of the Commissioner's determination, Botes did not corroborate Mathebula's evidence and I am inclined to concur with this determination.

27.1 Whilst Mathebula estimated their distance to be about five metres, Botes did not want to estimate the distance they were when they first saw Makgoe sleeping and remained connected to his refusal to estimate;

27.2 Botes was not at the first inspection *in loco* and is in fact not aware of same. He could not corroborate Mathebula as correctly determined by the Commissioner.

27.3 Botes also testified on Makgoe having placed the vehicle in reverse gear. This was never Mathebula's evidence. This was, just like Mathebula, not contained in his statement;

27.4 Botes testified under cross-examination that it is not a rule to write in the pocket book that Makgoe was found sleeping. This is contrary to Mathebula's evidence which clearly stated that it was a standard rule. This is a material contradiction as far as I am concerned;

27.5 Botes states that his statement was taken immediately after the incident but could not explain why some of the pertinent and particular situations were not included;

27.6 Botes also could not answer as far as the occurrence book (OB) entry, pocket book entry and online entry are concerned because this was not his responsibility. Mathebula on the other hand, conceded that all these were not done;

27.7 Botes also could not indicate in his own statement where he had written in terms of Makgoe having apologised and he did not see the need to do so. This is highly incredible and for once, he resonated Mathebula. This however does not make the applicant's case any better. I repeat, Makgoe's apology, if at all, carries a lot of weight to be omitted as it was.

Whether the disciplinary chairperson doubted the applicant's guilt

[28] The Commissioner in his award finds that "*the chairperson found the applicant guilty without analysing why the applicant was guilty, it is clear that that the*

chairperson doubted the applicant's guilt for some reasons I gave above for not finding the applicant guilty. The chairman noted his reasons for recommending a final written warning. There is not enough evidence that can warrant a guilty sanction. No online report. No OB entry was made and no photos. The fact that the chairman thought that there was insufficient evidence vindicates my analysis above. The dismissal was substantively unfair". There is simply no acceptable reason to interfere with this determination of the Commissioner as it is correct in fact and in law. The point is that the chairperson of the disciplinary hearing himself did not find enough evidence to find Makgoe guilty of the facts presented before him thus is it not clear how and why he actually arrived at the sanction of a final written warning when Makgoe should have been completely acquitted from the charge. His sanction is clearly inconsistent with his determination on the facts presented before him. This is in addition to the fact that during the first inspection *in loco*, it could not be established that a person could be seen from inside out the vehicle. This is made worse by the fact that the incident occurred at night.

[29] It is also not clear why the applicant instead sought to substitute the chairperson's sanction. In its own submission, the applicant indicates that upon review of the chairperson's determination a harsher sanction was opted for despite the applicant's lack of evidence to prove that Makgoe was sleeping. This piece of evidence was not vigorously presented and interrogated before the Commissioner and even then, it remains a destructive and unanswered question which in my opinion, goes to the core of this dismissal. The applicant cannot seek to uphold its disciplinary code which prescribes a dismissal sanction for someone who was sleeping on duty when there is essentially no evidence to support this. Makgoe should have been acquitted on the charge, period.

[30] The Commissioner's award is not reviewable as it does not contain any irregularities and more specifically, any reasonable presiding officer faced with the same facts such as those presented before the second respondent would come to a conclusion such as the second respondent's.

[31] I must also indicate that, given the transcript which seems to assertively expose the issues, the applicant should have been in a better position to judge for

itself that the review application is greatly unwarranted. It is on this basis that costs should follow the cause.

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

Order

1. The applicant's review is dismissed.
2. The applicant must pay the costs of this review.

Ntsoane AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv Victor Mndebele
Instructed by: Solomon Holmes Attorneys Inc.

For the respondent: Ms Motlatso Molewa
Instructed by: Seleka Attorneys