

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

Case No: JA 8/02

In the matter between:

**THEMBA MAHLANGU     Appellant**

and

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

**SIBUSISO MAGWAZA N O     Second Respondent**

**IMPUNZI COLLIERIES DIVISION     Third Respondent  
(a division of the Duiker Mining Group)**

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**J U D G M E N T**

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**GOLDSTEIN AJA:**

[1]     Th appellant was employed by the third respondent, which dismissed him on 9 April 1999 following a disciplinary enquiry at which he had been found guilty of misconduct on a charge of "assisting in the theft of coal". As a result of this dismissal, a dispute arose between the appellant and the third respondent about the fairness of the dismissal. This dispute was referred to the first respondent which assigned it to the second respondent for arbitration. The award of the second

respondent was brought on review by the appellant before **Revelas J** sitting in the Labour Court.

[2] The learned Judge dismissed the appellant's application with costs and granted leave to appeal to this Court.

[3] The evidence led before the second respondent established the following facts:

- a) three trucks left the mine property concerned at approximately 23h20 filled with stolen coal;
- b) at the relevant time the appellant who was the foreman was in his office at the plant;
- c) a Khumatsu 500 machine used for loading coal on trucks was parked in front of the foreman's office and was not indicating that it had recently been in use;
- d) the appellant was questioned that night about the use of the machine and he stated that he did not know who had used it since he was looking for the key and that it had never worked – presumably during his shift;
- e) the appellant as foreman was directly responsible for the machine;
- f) a stockpile of coal is 200 to 250 metres from the foreman's office.

[4] The appellant did not give evidence before the second respondent in regard to the events of the night in question, and confined his evidence to an attack on the

procedure followed by the third respondent during his disciplinary enquiry. In these circumstances the second respondent's finding that the Khumatsu had been used and that the appellant was probably on the scene at the time is justifiable. His finding that the dismissal of the appellant for misconduct was substantively fair is also justifiable. The appellant's attorney contended that the second respondent erred in not warning the appellant of the result of his failure to give evidence. As I have pointed out he did give evidence but restricted it to a procedural matter. Moreover, this point is not taken in the founding affidavit. Furthermore, the appellant played an active role in the proceedings before the second respondent and even cross-examined at stages, indicating that if he wished to give evidence on the merits of the charge against him he would have done so.

[5] In my view there is no merit in the appeal. The appellant's attorney concedes that costs should follow the result.

[6] I make the following order: The appeal is dismissed with costs.

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**E L GOLDSTEIN**  
Acting Judge of Appeal

I agree

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**R M M ZONDO**  
Judge President

I agree

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**D MLAMBO**  
Acting Judge of Appeal

For the Appellant:

Attorney G N MOSHOANA

For the Third Respondent :  
Third Respondent's Attorney:

A T MYBURG  
Deneys Reitz

Date of Hearing:  
Date of Judgment:

14 November 2002  
20 December 2002