

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: JA54/2006

2008-02-28

10 **In the matter between**

ROBERT RAWU

Appellant

And

CCMA & OTHERS

Respondent

J U D G M E N T

DAVIS JA: During September 2001, third respondent dismissed the appellant for his involvement in the theft of gold bearing material and resulted in the breakdown of the trust relationship between the parties.

20 The appellant referred the dispute to the first respondent and challenged both the procedural and substantive fairness of his dismissal. The referral culminated in arbitration proceedings under the auspicious of second respondent on 19 March 2002.

During the course of these arbitration proceedings, two witnesses, Messrs Prinsloo and van Wyk testified on behalf on the third respondent,

while the employee/appellant testified on his own behalf. On this occasion the third respondent's representative tendered certain documentary evidence and most important a video recording.

In the arbitration award dated 26 March 2002, the second respondent upheld the appellant's dismissal on both procedural and substantive grounds. On 3 August 2005, appellant instituted an action for review of the arbitration award in the Labour Court and in a judgment of 28 February 2006, Revelas J dismissed this application.

With the leave of the court *a quo* the matter has come on appeal
10 to this court.

There are certain facts which are common cause: appellant was employed as a section supervisor for the crusher team in the west section of the third respondent's gold refinery. On 4 September 2001, appellant was dismissed for his involvement in theft of gold bearing material; it resulted in this breakdown of the trust relationship to which I have already made reference. The theft of the gold bearing material took place at the Velmed sump/pump area of the crusher plant at the third respondent's number 2 gold plant; occurred upon removing of a pipe that exited the sump/pump area when the crusher plant was not running. The
20 sump/pump area is a small area of approximately 6 meters by 8 meters and comprises a square area surrounded by concrete with two pumps underneath it. There is only one access and exit area with steps leading into this area. Allegations against the appellant concerned his involvement on these unlawful activities on 11 June 2001 and 14 June 2001.

During both the internal disciplinary hearing and the arbitration proceedings, third respondent produced evidence by way of the video recording to which I have made reference. This recording was produced by a hidden video camera that had been installed in the area over a period of approximately three weeks. It did not however include any sound or audio recording. The video recorder by which the video recording was produced was set to record events that occurred at the entrance and exit to the sump/pump area and not to depict people/events inside the area.

10 Insofar as the allegations against appellant were concerned, third respondent relied on portions of video which recorded events that occurred on the two dates in question, 11 June 2001 and 14 June 2001. From the video, as it is set out in the papers, it appears that two persons are seen to be entering the sump/pump area. Another person, Mr Petrus Mofokeng is seen standing on steps leading to the area. At 16:28:33 the appellant approached the area from the side, appellant stood next to Mr Mofokeng, appellant is then seen looking into the sump/pump area and then walking away. From approximately 17:00 onwards the removal of gold bearing material takes place.

20 It is apparent from the record that the following events then are depicted on the same video recording on 14 June 2001. At approximately 23:15:04, two individuals are seen entering the pump/sump area. At approximately 00:01:38, the appellant is seen appearing at the sump/pump area. The appellant is seen to be standing around the entrance thereof, in front of the pipe from which the gold bearing material

is being removed. He then bends forward and looks into the area, that is the area where the two individuals were in fact located. Other persons are then seen to be subsequently removing gold bearing material. Appellant was the person depicted on the video recording concerning the events of 11 June and 14 June 2001.

Mr Mofokeng was a section supervisor for third respondent's eastern shift. It is common cause, that he had no reason to be in the area at the time when the appellant observed him on 11 June 2001. Neither did any of the other perpetrators shown on the video recording have any
10 authority to be in the area at the relevant times. It is common cause that the other persons depicted on the recording including Mr Mofokeng, engaged in illegal activities concerning the unauthorised removal of gold bearing material. Appellant did not report the presence of Mr Mofokeng at the area on 11 June 2001 to any of his supervisors.

The second respondent in his award recorded the following facts as common cause:

"The parties were in agreement with the following salient points of fact:

- a) That illegal activities involving theft and/or
20 unauthorised removal of gold bearing material took place on 11 and 14 June 2001;
- b) That the employer arrived at the relevant place whilst perpetrators of the said misconduct were inside the area in question;

- c) That in terms of the applicable procedures, those people had no authority or reason to be at the area;
- d) That the said people entered the area before the employer arrived and further left it after he had already left;
- e) That the illegal activities concerned warranted dismissal if proved.

10 Based on the appellant's body language as seen on the applicable portions of the video recording, Mr Prinsloo, third respondent's witness, testified, to the effect, that it was apparent that the appellant had conversed with Mr Mofokeng.

The appellant did not challenge Mr Prinsloo's specific evidence concerning the appellant's body language in question but he did deny that he spoke to Mr Mofokeng.

20 He testified that he saw Mr Mofokeng standing at the area on 11 June 2001 and suspected that "*there (was) something wrong*". Appellant examined the area to enquire whether the drain pipe was properly pumping from the inside but he did not detect anything untoward. Appellant did not speak to Mr Mofokeng nor did he make any enquiries from him, as the two of them were on the same supervisory level. He did say

however, that Mr Mofokeng had been his subordinate, then he certainly would have made enquiry.

During the arbitration proceedings, the appellant conceded that he knew the identity of Mr Mofokeng. However, during the internal disciplinary hearing, the appellant denied that he knew the identity. When confronted with conviction, appellant conceded that he was "*lying*" during the disciplinary hearing because he feared some form of intimidation might otherwise take place.

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When challenged during cross examination to whether he reported this intimidation to anybody, appellant tendered the unsubstantiated explanation that he "*was not given the chance to do so*".

In reaching his conclusions, the second respondent proceeded by way of assessing the appellant's overall credibility and made an adverse credibility finding of appellant's testimony. He did so, it appears against the background of appellant's false denial of the alleged conversation between the appellant and Mr Mofokeng and, further, the general approach of the appellant's testimony. He then concluded that appellant's evidence was simply 'incredible' and illogical and further that appellant desperately wanted to put as much distance between himself and Mr

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Mofokeng, as he could simply, *“because he was aware from the video tape that the latter’s culpability was beyond the shadow of doubt”*.

In this regard, second respondent had regard to the improbable explanation tendered by appellant that he did not speak to Mr Mofokeng when he observed the latter at the area on 11 June 2001 because the two men were on the same level of employment in the second respondent’s operation.

Second respondent concluded from, all of the evidence, that he
10 could infer that the appellant had indeed spoken with Mofokeng and he rejected the appellant’s version on the basis that it was highly unlikely that the employee would ignore Mofokeng who is equally responsible for the area in question, when he suspected there was something wrong at the area. Second respondent then proceeded to consider whether or not the appellant was aware and in fact took part in said illegal activities in one way or the other. He found that this was the case and that *“a link”* existed between appellant *“and the people who stole and removed gold bearing material from the prohibited area without permission”* and effectively *“that the appellant associated himself actively with the*
20 *employees who were engaged in the illegal activities involving stealing and/or handling of gold bearing material”*.

In reaching this conclusion, he emphasised the evasive and unreliable quality of the appellant as a witness and he accepted the following:

- a) That the employee saw Mofokeng standing at the entrance of the sump/pump area where there existed no reason for him to be there but failed to follow the matter up with his seniors;
- b) That the employee looked down into the sump in circumstances which he ought reasonably to have seen the employees therein who had no reason to be there;
- c) It was clear enough in the sump for the employee to see the pipe which he wanted to see;
- 10 d) That the area was small and contained only pipes.

Mr van As, who appeared on behalf of appellant, raised two essential arguments against this approach, firstly, that the charge had been one of conspiracy and that accordingly the existence of an agreement between the appellant, Mofokeng and others had never been put in any terms to the appellant during the hearing. Secondly, that other than the evidence from the video, there was no direct evidence implicating the appellant in the events which had taken place.

To evaluate these submissions, it is important to emphasise the approach which has now finally been settled by the Constitutional Court
20 in **Sidumo the Rustenburg Platinum Mine Limited, 2008 (2) BCLR 158 (CC)**, in which the Constitutional Court has settled the approach which courts must adopt to reviews of this nature. I wish to emphasise some important aspects of the judgment, particular of Navsa AJ, who wrote a judgment in which a number of the judges concurred. I hesitate to say majority in that Navsa AJ was supported by four other judges of

the Court. There is a judgment of Ngcobo J which is supported by three other judges of the Court. Nothing material turns on the difference of approach of these judges insofar as this dispute is concerned.

Navsa AJ emphasised that in determining the fairness of a dismissal *“there is nothing in the constitutional and statutory scheme that suggests that in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provision compels the conclusion that the commissioner is*
10 *to determine the dismissal dispute as an impartial adjudicator”*. (para61)

In providing the arbitrator with this particular power, the question then arises as to when can a review of such decision take place. Navsa AJ answers thus: *“[C]arephone (supra) held that Section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relations to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: is a decision reached by the commissioner, one that a reasonable decision maker could not reach?*
20 *Applying it will give effect not only to the constitutional right to fair labour practices but also to the right to the administrative action which is lawful, reasonable and procedurally fair”* para 110. In this connection see also the judgment of Ngcobo J at paras 242.

Navsa AJ gives content to this test as outlined by applying the standard to the facts of **Sidumo**, the conclusion of which is relevant to

this case: “[h]aving regard to the reasoning of the commissioner based on the material before him, it cannot be said that his conclusion is one that a reasonable decision maker could not reach. This is one of those cases where the decision maker acting reasonably, may reach different conclusions. The LRA has given that decision making power to a commissioner” para 119.

Accordingly, in applying this test to the present dispute, the question arises as to whether the arguments raised by Mr van As, could justify a conclusion that no reasonable decision maker could have come
10 to the decision arrived at by the second respondent in this case. If a criminal test is applied, this court might have considered substituting its decision for that of second respondent. But a criminal test is not applicable: the test is, did the decision maker act reasonably even if another reasonable decision could also have been made? The fact that there was no express version put to a witness of the existence of an agreement does not on its own subvert the reasonable basis of the decision arrived at by the second respondent. He came to the conclusion that the only reasonable inference that could be drawn from the appellant standing in this closely demarcated area with people who
20 were bent on theft and did so on two separate occasions, was that he was part of that conspiracy. That is a reasonable inference that can be drawn from all the facts of this case. The fact that there was no other material evidence other than the video is a submission that needs to be qualified. Second respondent examined the video in the light of the evidence that had been given by the third respondent’s witnesses as

well as the evasive, unreliable quality of the evidence given by the appellant. Again, in a criminal case it might be arguable that an overly excessive reliance upon the evidence of the accused was not justifiable but as already stated this is not a criminal case and, on the basis of all the evidence, the conclusion to which the second respondent came is justifiable upon the evidence heard and the analysis thereof which he undertook.

On the test applied by Navsa AJ in ***Sidumo*** the decision maker in this case, second respondent, acted as would a reasonable decision
10 maker.

For all of these reasons, the appeal is dismissed with costs.

JAPPIE & LEEUW JJA: Concured.

DAVIS JA

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On behalf of the Appellant: Mr van As

On behalf of the Respondent: Not on record