



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA8/2012

In the matter between:

TSELENG ENOCH NTOAGAE

First Appellant

NATIONAL UNION OF MINEWORKERS

Second Appellant

and

ANGLO PLATINUM LIMITED

(MOTOTOLO JV CONCENTRATOR)

Respondent

Heard: 5 September 2013

Delivered: 19 September 2014

JUDGMENT

MOKGOATLHENG AJA

[1] This is an appeal against the judgment and order of the Labour Court (Francis J) in which the first respondent's application to review and set aside the commissioner's award was upheld. The appeal is by the leave of the *court-a-quo*.

[2] Two main issues arise from the appeal:

- (a) firstly, whether the *court-a-quo* was correct in dismissing the first appellant's point in *limine* to the effect that the respondent did not have *locus standi* to bring the review application as no employment

relationship existed between the first appellant and Anglo Platinum Limited; and

- (b) secondly, whether the *court-a-quo* was correct in upholding the review application and setting aside the commissioner's award (in which he found the first appellant not guilty of dishonesty) as unreasonable.

- [3] The first appellant contends that Francis J erred in dismissing the point in *limine* that the respondent was not entitled to institute the review application. There is no merit in this submission. In the arbitration proceedings the commissioner sought clarity regarding the relationship between Mototolo Joint Venture Concentrator and Anglo Platinum Limited. The first appellant's attorney confirmed that Mototolo Joint Venture Concentrator was not a legal entity but was an unincorporated joint venture between Rustenburg Platinum Mines and XK Platinum Partnership (a partnership between Xstrata South Africa (Pty) Ltd and Kagiso Platinum Venture (Pty) Ltd owned by Anglo Platinum Limited, consequently, the *court-a-quo* correctly dismissed the first appellant's point in *limine*.
- [4] Mototolo Joint Venture Concentrator as a Joint Venture is part of Anglo Platinum Limited and is referred to in the founding affidavit as belonging to Anglo Platinum Limited. The Mototolo Joint Venture Concentrator is solely managed by Anglo Platinum Limited.
- [5] Significantly, the first and second appellants request to the CCMA to arbitrate the dispute cites the first appellant's employer as '*Anglo Platinum Mototolo JV Concentrator*'. In terms of the Request for Arbitration the first appellant's union, The National Union of Mine Workers pertinently states under Dispute Details under Case Reference Number LP6311/08, that the case is between NUM obo Ntoagae Enoch and Anglo Platinum Mototolo JV Concentrator, that the issue in dispute is: "*the applicant was unfairly dismissed by the employer after he had resigned with immediate effect.*"
- [6] The Disciplinary Complaint Form pertinently shows that it was issued by Anglo Platinum Mototolo JV Concentrator which is referred to as the entity which is prefers charges against the first appellant. The first appellant's

employment contract pertinently shows that it was issued by Anglo Platinum Limited Human Resources Division. The first appellant's resignation letter dated 26 September 2008 addressed to the Manager Mototolo JV Concentrator was responded on behalf of Mototolo JV Concentrator by Anglo Platinum Limited.

- [7] The first appellant's payslip and conditions of service are issued in the name of Rustenburg Platinum Mine Ltd which is a subsidiary of Anglo Platinum Limited. The claim forms submitted by the first appellant bear the name Mototolo JV Concentrator and also refer to the '*Anglo Platinum tip-off information line*'.
- [8] The Business Travel Claim Forms bear the name of Anglo Platinum Mototolo Joint Venture Concentrator. The Anglo Platinum Group Human Resources Policy which came into operation on 12 May 2005 provides that the rules applicable to the re-imbursment of business travelling expenses incurred by employees for business purposes and the scope of the said policy shall apply to all enrolled employees of Anglo Platinum, its managed joint ventures and subsidiaries.
- [9] The first appellant was an environmental assistant engaged by the Mototolo JV Concentrator and had a green reporting line to the Anglo Platinum Limited Environmental Department and also a red reporting line to his superior Van Heerden. Consistent with the respondent's human resources policy, the trips the first appellant undertook and which formed the subject of his dismissal were to environmental meetings conducted under the auspices of Anglo Platinum Limited.
- [10] Because Mototolo Joint Venture Concentrator is a managed joint venture owned by Anglo Platinum Limited, the latter's policies and procedures are applicable to Mototolo Joint Venture Concentrator.
- [11] Having regard to the above exposition it is disingenuous of the first appellant to dispute the respondent's *locus standi* by alleging that there was no evidence before *court-a-quo* to come to the finding that Mototolo Joint Venture Concentrator was a joint venture owned and managed by Anglo Platinum

Limited. It follows that there was an employment relationship between the first appellant and the respondent, which entitled it to be a party to these proceedings as it has the *locus standi*. See *CAWU v Grinaker Civil Engineering* [2003] 1 BLLR 5 (LC).

The Factual Matrix

- [12] The respondent's principal objective is to mine platinum and conduct associated activities. On 1 August 2006 the first appellant was employed by the respondent as an environmental assistant reporting to his supervisor Van Heerden. During August 2008 the respondent received information that the first appellant had submitted fraudulent travel claims. Consequent to this information the respondent conducted a forensic investigation which revealed that the first respondent had submitted fraudulent travel claims in respect of 21 May 2008, 22 May 2008, 10 July 2008 and 15 July 2008 in total amounting to R6 832.80.
- [13] On 21 May 2008 the first appellant travelled from Modikwa Platinum Mine to Bela Bela in a vehicle owned by Modikwa Platinum Mine, a joint venture entity owned by the respondent. The first appellant lodged a claim for the round trip distance of 360 kilometres. On 22 May 2008 the first appellant travelled from Bela Bela to Modikwa Platinum Mine and she again used a Modikwa Platinum Mine's vehicle. The first appellant again lodged a claim for a round trip distance of 360 kilometres. The claims amounted to R2 102.40.
- [14] On 10 July 2008, the first appellant travelled from Burgersfort to Rustenburg to attend a training course in a vehicle owned by Twickenham Mine which is a wholly-owned subsidiary of the respondent. On the same day the on his return, the first appellant travelled in a vehicle belonging to Lebowa Platinum Mine, a joint venture owned by the respondent. The first appellant lodged a round trip claim for a distance of 900 kilometres amounting to R2 628.00.
- [15] On 15 July 2008 the first appellant travelled to Johannesburg with Ms Mposi, an environmental officer employed by Twickenham Mine in a vehicle owned by the latter to attend a meeting. The first appellant and Ms Mposi returned from Johannesburg on 17 July 2008 using the said Twickenham Mine's

vehicle. The first appellant lodged a claim for a round trip distance of 720 kilometres amounting to R2 102.40.

[16] The respondent's business travel is regulated by the Anglo Platinum Limited's Group Human Resources Business Reimbursement Travel Policy which pursuant to *clause 2* thereof applied to all its employees and the employees of its joint ventures and subsidiaries.

[17] The respondent's Reimbursement Travel Policy was displayed on the notice board at the employee benefits office and was also available on the respondent's intranet. All employees were inducted with regard to the respondent's travel policy. The first appellant also discussed the respondent's travel policy with his immediate supervisor Van Heerden when new travel rates pertaining to the said business travel policy were introduced.

[18] Clause 8.1 of the Policy Rates and Conditions provides as follows:

'Rates and conditions of payment should as far as possible be sufficient to avoid having an employee experience economic loss as a result of incurring reasonable expenses while travelling on company business. The underlying principle to be applied is that employees would neither lose nor gain financially for business related travel and any rebates or discounts must be taken advantage of to reduce claims.'

'Travel expenses must be properly documented and approved. It is each employee's responsibility to adhere to the company policy when involved with expenditure on behalf of the Company. Managers must be satisfied that travel requests and claims are consistent with this policy and that they are in pursuit of genuine Company business.'

[19] Clause 9.10 which deals with public transport provides that:

'Employees making use of public transport (Mini busses, busses, taxi's, etc) for any company related business travel (Not from home to work and back) will be reimbursed at R2.92/Km.'

[20] The first appellant did not make use of private or public transport on any of the abovementioned trips, but nevertheless submitted travel claims to the

respondent for reimbursement. Pursuant to the forensic investigation the first appellant was charged with committing acts of dishonesty pertaining to the lodgement of travelling claims without having incurred any travelling expenses, the first appellant was found guilty and dismissed.

The Arbitration

- [21] Subsequent to the first appellant's dismissal, the second appellant referred the dispute to the CCMA for conciliation. At the arbitration only substantive fairness was placed in dispute. Van Heerden who testified on the respondent's behalf *inter alia* stated that the first appellant was aware of the respondent's travel policy as he had personally explained it to him when the latter had submitted travel claims for attending work on Saturdays, but such claims were not allowed. Van Heerden disputed that an employee could claim travelling expenses in terms of the respondent's Business Reimbursement Travel Policy if he or she had not incurred any out of pocket expenses for such travelling.
- [22] Van Heerden testified that he had erroneously approved the first appellant's travelling claims because the latter had informed him that he had used public transport for such travelling trips. Employees cannot submit travel claims if they did not pay for petrol or public transport as a result the first appellant's conduct was fraudulent. As a result of the first appellant's fraudulent conduct, the employment relationship between himself and the first appellant had broken down irretrievably.
- [23] The first appellant testified *inter alia* that Van Heerden did not explain the respondent's Business Reimbursement Travel Policy to him as enunciated by the respondent's Human Resources Department Moldenhauer his previous supervisor had explained the respondent's travel expense policy to him as follows: "*whenever an employee travels on a business trip and is provided with transport by the employer he is not entitled to claim. But the policy also provided that should the employer not provide transportation for the employee for business travel then an employee is entitled to claim for travelling at a rate pre-determined by the employer per kilometre travelled.*"

The Award

- [24] In his award the commissioner in respect of *paragraph 9.10* of the respondent's travel policy found that reimbursement in terms thereof did not mean reimbursement for expenses actually incurred, but meant compensation payable to the employee, as the amount payable is based on the distance travelled.
- [25] The commissioner also found that the respondent's travel policy does not require an employee to prove actual expenses incurred but merely required that the employee should have conducted such travelling either by public or private transport. The first appellant did not commit fraud in claiming travel costs, consequently he had to be reinstated.
- [26] The respondent's travel policy provided payment per kilometre travelled, which meant that the payment was a form of compensation and not an actual reimbursement. The first appellant conceded that the aim of the respondent's travel policy was to ensure that employees '*did not lose out financially when doing things for the company.*' He accused Van Heerden of being untruthful and admitted that the incident impacted on the relationship with Van Heerden.
- [26] At the arbitration the first appellant did not call Moldenhauer to testify on his behalf regarding the existence of this alleged travel policy, nor did he present any documentary evidence in support of this travel policy. Van Heerden's evidence regarding the principles applicable to the respondent's travelling policies that business travel is reimbursive of nature and not compensatory, is consistent with the prescripts of the respondent's Business Reimbursement Travel Policy.

The Review Judgment

- [27] The court-a-quo correctly found that the commissioner was faced with two diametrically opposed versions regarding the applicable travel policy and also regarding whether the first applicant had told Van Heerden that he had used public or private transport in travelling to the respondent's meetings.

- [28] The finding by Francis J that the first appellant was dishonest regarding the applicable travel policy and how he understood it, is supported by the respondent's Business Reimbursement Travel Policy. On the probabilities, the first appellant was fully aware of the content of such policy because the reimbursement rate utilised by the first appellant for allegedly for using public transport is recorded in Clause 9.10 of the respondent's travel policy as R2.92 per/km in the first appellant's claims which is the same reimbursement rate set out. Further the *court-a-quo* correctly took into account the fact that the respondent's travel policy makes it clear that employees are reimbursed for business travel in order not to suffer losses or gain financially.
- [29] It is common cause that the first appellant submitted three travel claims in which he claimed a total of R6 832.80 for having travelled 2340 km's on company business at a rate of R2.92 per km, and that the claims were paid. It is also common cause that on all three occasions, the first appellant secured a lift in vehicles belonging to Modikwa Mine (on the first occasion) and to Twickenham Mine (on the second and third occasions) respectively and that he did not incur any travel expenses whatsoever.
- [30] The first appellant's argument that Van Heerden's predecessor Moldenhauer verbally explained a different travel policy to the respondent's applicable Business Reimbursement Travel Policy is unsustainable because the respondent's travel policy came into operation on 12 May 2006. Consequently, when the first appellant commenced employment on 1 August 2006 the respondent's travel policy was in existence and as practice the probability is he was inducted into same.
- [31] The learned judge correctly found that Moldenhauer must have explained the respondent's Business Reimbursement Travel Policy to the first appellant after his employment on 1 August 2006 as the travel policy became applicable on 12 May 2006.
- [32] In any event, on the probabilities it cannot be possible that Moldenhauer misrepresented the Anglo Platinum Limited Group Human Resources Business Reimbursement Travel Policy to the first appellant by stating that as

long as the employer had not provided transport and the employee has engaged in business related travel, the employee was entitled to claim irrespective of whether the employee did not incur any travel expenses.

[33] The commissioner accepted that the Anglo Platinum Limited Group Human Resources Business Reimbursement Travel Policy was applicable, and implicitly that the first appellant was aware thereof. The commissioner's conclusion that the policy provided for the payment of the claims submitted by the first appellant irrespective of whether he had incurred travelling costs, and that he was not guilty of misconduct is unreasonable in that it is wholly at odds with:

- (i) the respondent's Business Reimbursement Travel Policy which the commissioner had accepted as the respondent's applicable travel policy;
- (ii) the principle underlying the travel policy that employees are reimbursed for '*expenses incurred*';
- (iii) the principle underlying the policy that employees should not be out of pocket for having incurred travel expenses on official business and that they should '*neither lose nor gain financially*';
- (iv) the fact that the rate of R2.92/km is the rate at which employees are '*reimbursed*' for travelling on business by using public transport; and
- (v) the text of the relevant travel claim forms completed by the first appellant, read (at the foot thereof) that '*claims for refunds should be submitted...*'

[34] The *court-a-quo*, correctly found that the commissioner did not apply his mind to the crucial dispute, namely what transpired between the first appellant and Van Heerden at the time the first appellant presented the travel claims to him for authorization.

[35] On the probabilities Van Heerden's testimony that the first appellant told him that he had made use of '*public transport*' (which would have entitled him to the reimbursement of expenses), sounds more probable and plausible, because Van Heerden would not have authorized the claims if he had known

that the first appellant had secured a lift in vehicles belonging to the respondent's joint ventures and subsidiaries as the first appellant would not have incurred any expenses in utilising such transport, consequently the first appellant was not entitled to claim reimbursement was due to the first appellant.

- [36] The absurdity and unreasonableness of the commissioner's interpretation of Clause 9.10 of the respondent's Business Reimbursement Travel Policy is demonstrated by the concession made by the first appellant's assertion that because he had travelled with two colleagues employed at Modikwa and Twickenham Mines on the days in question, consequently, all three of them qualified to submit claims, despite none of them having actually incurred any travel expenditure.
- [37] Seen from this perspective the commissioner's interpretation of Clause 9.10 of the respondent's travel policy is not logical and does not make commercial sense. The suggestion is utterly untenable that an employer would compensate an employee for not having incurred any travelling expenses but compensate him for having travelled in the respondent's subsidiary's or joint venture's motor vehicles to attend its own meetings.
- [38] There is no merit in the first appellant's counsel's submission that the claim form does not enquire into the mode of transport used, nor does it prescribe that when one travels in a vehicle owned by the respondent's subsidiary or joint venture, one is not entitled to lodge a claim. Further there is no merit in the submission that Clause 8.1 of the respondent's travel policy does not refer to actual expenses incurred travelling, nor does it limit payment to reimbursement with regard to reasonable expenses incurred whilst travelling.
- [39] The aforementioned submissions are unsustainable because the principle underlining the respondent's Business Reimbursement Travel Policy is that employees should not be out of pocket and neither should they lose nor gain financially if they have incurred travelling expenses.
- [40] The first appellant's counsel's submission that whether the respondent's travel policy made provision for reimbursement or compensation was irrelevant

because no proof of actual expenses incurred was required to validate the lodgement of the claims, has no merit. Neither does the first appellant's counsel's argument that the travelling expenditure is not necessarily tied to the actual disbursements incurred have merit, because counsel conceded that concepts predicated reimbursement and compensation have totally different meanings, because reimbursement refers to an exigency where one has disbursed monetary expenditure while compensation refers to the payment of a version after having performed an obligation.

- [41] A reviewing court is entitled to analyse the reasons predicated an award, but in order for an award to be struck down it must be substantially unreasonable. An applicant in a review application must show that both the reasons and the outcome are unreasonable having regard to the consideration of the totality of the evidential material before a commissioner.
- [42] In the present matter, the commissioner misdirected himself in that he did not consider the central dispute, namely, that the first appellant presented fraudulent travel claims to Van Heerden for authorisation. Further with regard to the interpretation of the Anglo Platinum Limited Group Human Resources Business Reimbursement Travel Policy and the conclusion the commissioner reached in respect thereof that the first respondent was entitled to claim for travelling on business to attend appellant's meeting without having incurred monetary expenditure having regard to the totality of the evidence the commissioner's conclusion was unreasonable.
- [43] In evaluating whether the commissioner's conclusion in interpreting the respondent's travel policy and his finding that the first appellant was entitled to the payment of his travel claims because he did not commit fraud, the question is would a reasonable commissioner have come to the same conclusion.
- [44] It is patently clear that no reasonable commissioner applying himself with any degree of diligence in interpreting Clauses 8.1 and 9.10 of the respondent's Business Reimbursement Travel Policy, and in properly considering the totality of the evidence could come to the conclusion the commissioner

reached because such conclusions cannot fall within the purview of reasonable conclusions a reasonable commissioner would have reached having regard to the totality of the evidential material before him. See *Herholdt v Nedbank Ltd* 2013 (6) SA SCA at para 25.

- [45] The respondent has requested an order for costs against the appellants to mark the court's disapproval of, and displeasure with, the appellants in opposing the appeal on technical grounds by contending that the respondent did not have *locus standi* to launch the review application or this appeal. Although this point was dismissed in favour of the respondent, the *locus standi* point raised by the appellants and the commissioner's interpretation of Clause 8.1 and 9.1 of the respondent's Business Reimbursement Travel Policy were arguable, consequently, a costs order against the appellants would not be just and equitable.

The Order

- [46] (i) The appeal is dismissed;
- (ii) the first appellant's dismissal by the respondent is confirmed; and
- (iii) there is no order as to costs.

Mokgoatheng AJA

Tlaetsi DJP and Dlodlo AJA concur in the judgment of Mokgoatheng AJA

APPEARANCES:

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LABOUR APPEAL COURT