



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA43/2013

In the matter between:-

NATIONAL UNION OF MINEWORKERS

First Appellant

TSHUNGU D

Second Appellant

and

RUSTENBURG PLATINUM MINE

(MOGALAKWENA SECTION)

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

THABA P G N.O.

Third Respondent

Heard: 18 September 2014

Delivered: 23 October 2014

Summary: Review of arbitration award. Employee dismissed for insubordination- mutual destructive versions- credibility findings – commissioner’s finding on probabilities favouring employee’s version and rejecting employer’s version - commissioner finding dismissal substantively unfair. Labour Court setting aside arbitration award. Appeal: Witnesses’ evidence corroborating that of employee that he was not guilty of the charges for which he was dismissed – commissioner finding on probabilities reasonable- - Labour Court’s judgment set aside - appeal upheld with costs.

Coram: Musi JA, Murphy et Setiloane AJJA

JUDGMENT

CJ MUSI JA

- [1] This appeal, which is with the leave of the court *a quo* (Bhoola J), is against the judgment of the court *a quo* in which it reviewed and set aside an award by the third respondent (the arbitrator) and substituted it with an order that the dismissal of the second appellant (Tshungu) was substantively fair.
- [2] Tshungu was a shop steward of the first appellant (the National Union of Mineworkers (NUM)) and employed by the first respondent (the company). He was dismissed on 22 October 2010 after he was found guilty of insubordination and engaging in activities that hindered the company's production. He referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). After an unsuccessful conciliation process, he referred the dispute to arbitration. On 21 September 2001, the arbitrator found that his dismissal was substantively unfair and ordered the company to reinstate him. The company launched a review application against the arbitrator's award. The court *a quo* found in the company's favour and set aside the award. This appeal is against the order of the court *a quo*.
- [3] Tshungu was employed as a multi-skilled operator and worked on the "A" shift which began at 06H00 on 2 January 2010. Mr Jan Shebango was the supervisor and Mr Andries Windt the pit superintendent of the "A" shift.
- [4] It was part of the company's standard operating procedure that every day, at the beginning of the shift, a line-up meeting was held to advise workers on production, health and safety matters. The subject matter of this appeal relates to what actually happened during and after the line-up meeting on 2 January 2010.
- [5] Windt testified during the arbitration that, on 2 January 2010, the usual line-up meeting was held at the start of the shift at 06H00. The meeting normally took

approximately 15 minutes. Whilst Shebango was busy with the line-up, Tshungu took over and discussed “stuff about the union” with his co-workers. He did not confront Tshungu immediately. After the line-up meeting, at approximately 08H30, he asked Tshungu why he kept on overruling the agreement between management and the union. Tshungu said to him that he (Windt) did not care about the union. He also said that Windt does not respect the union. He further said that he (Tshungu) would do as he pleases and that Windt should charge him so that they could settle the matter once and for all.

- [6] According to Windt, the agreement between management and the union was that Tshungu should inform him, as the shift leader, in advance whenever he wanted to discuss union issues with the employees. The reason for the arrangement was so that the shift leader could request the employees to report for duty earlier in order to be addressed by the union representative.
- [7] Windt further testified that Tshungu’s conduct made him feel powerless and not in control. Tshungu disrespected him and whenever Tshungu addressed the employees, it affected the time that the shift was supposed to start. This was the third time that Tshungu addressed the line-up meeting without permission.
- [8] He testified during cross-examination that, he did not understand the language that Tshungu spoke at the line-up meeting. He did not ask Shebango what Tshungu said. It was put to Windt that Tshungu denied talking to the employees on 2 January 2010. Windt admitted that he did not report the incident on that particular day.
- [9] Mr Jan Shebango testified that the line-up meeting usually took 30 minutes. He confirmed that Tshungu addressed the employees on 2 January 2010 during the line-up meeting. He testified that he could not hear what Tshungu was saying because he was busy with something else. He could not say how long Tshungu addressed the workers.
- [10] Mr Christoffel de Bruin testified that he is in the company’s employ as a dispatch engineer in charge of the computerised dispatch system. On average, the “A” shift produced 2943 tons of platinum ore per day but on 2

January 2010 the “A” shift produced 460 tons. 2943 tons of platinum ore normally would yield a potential income of approximately R155 000,00. On the other hand, 460 tons of platinum ore would yield a potential income of R24 255,00. Although the figures do not add up, he testified that there was a loss of R131 250,00.

- [11] During cross-examination, he testified that the loss was as a result of the late start of the “A” shift. When it was put to him that it took 30 minutes to do a shift change-over he conceded that he did not know. It was also illustrated to him, based on company data, that equipment failure or breakdown rather than the lateness of the ‘A’ shift was the major cause of the loss of production, because the ‘A’ shift started at 06H50. It was also put to him that the 20 minute production loss purportedly caused by Tshungu could not lead to the astronomical loss that he testified about.
- [12] Mr Millan who was the chairperson of the disciplinary hearing testified about the procedural fairness of the hearing.
- [13] Mr Dickson Tshungu testified that he was at the line-up meeting on 2 January 2010. He did not speak at that meeting. The workers raised issues relating to food and additional supervisors with Shebango and Windt. He testified that in terms of the company’s disciplinary guidelines, he as a first offender, was supposed to have been given a final written warning after being found guilty of insubordination. He was however dismissed. He pointed out that, on the company’s official records, the reason for the delay on 2 January 2010 is given as “first shovel ready 15 minutes into the shift”. There was no indication at all that he was the reason for the delay. He further testified that on 10 February 2010, he attended a meeting with the management whereat he was very vocal against policy and other issues which the management wanted to introduce. He was informed about the charges on 11 February 2010.
- [14] Mr Klaas Legodi, who was also a shop steward, confirmed that Tshungu was very vocal at the meeting held on 10 February 2010.

[15] Mr Julius Nome testified that he is a truck operator and safety representative. He was at the line-up meeting on 2 January 2010 where he held the safety talk. He confirmed that Tshungu did not speak at the line-up meeting.

[16] During cross-examination, he denied that Tshungu took over the line-up meeting. According to him, Jame Baloyi raised the issue about workers who did not get food and others who received rotten food.

[17] The arbitrator summarised the evidence and concluded as follows:

‘The applicant was found guilty and dismissed for insubordination and engaging in activities which hindered company production. The question whether the applicant addressed the line up without permission thereby causing late start of the shift. During cross-examination the respondent’s first witness Mr. Windt said that the applicant addressed the line up without permission. He contended that he did not understand the language hence he was unable to explain what the applicant was talking about. Mr. Shebambo (sic) said that he did not hear what the applicant was talking about because the applicant would have used the language that his colleagues understand. The applicant’s third witness Mr. Nong testified that the applicant did not speak during the line-up. His evidence was supported by the applicant. According to him employees raised the issues pertaining to food parcels on public holiday and additional trainer supervisor. Mr. Windt averred that he did not report the alleged incidents in terms of Platinum Rules. These in my mind create a probability that the applicant did not speak during the line-up. I am mindful that the shift started late on the day in question and the respondent has recorded lost. Therefore with insufficient evidence I could not link the applicant to the loss. It is my findings that the applicant did not commit the alleged misconduct.’

[18] The company essentially raised two review grounds in its review application. Firstly, it alleged that the arbitrator disregarded relevant evidence. Secondly, it alleged that he relied on irrelevant factors to arrive at the finding that the dismissal was substantively unfair.

[19] The court *a quo* found that the arbitrator correctly identified the issues that fell to be determined as whether Tshungu addressed the line-up on the day in

question and whether that resulted in a disruption of production and resultant losses.

[20] The court *a quo* made the following observations and findings:

[5] The evidence led in this regard was that of the respondent's witnesses to the effect that Wayne and Shibambo (sic) both testified that they saw Tshungu addressing the employees during the line up. Shibambo's (sic) evidence is that he saw his mouth moving but he did not hear anything and Wayne's evidence was that he did not understand the language that was being spoken to Tshungu and hence it could not be proven that he was in fact addressing the line up in regard to union related issues, is irrelevant.

[6] Wayne's evidence was that he approached Tshungu after the meeting in order to establish why he had disrupted the meeting and Tshungu replied that he was busy with union business and that if Wayne was dissatisfied with that, Wayne should charge him accordingly.

[7] The Arbitrator appears not to have had regard to this issue. Furthermore, the Arbitrator also fails to acknowledge the concession albeit made temporarily by Mr Julius Nong that Mr Tshungu did address the line-up.

[8] For these reasons it would appear to me that the entire award is focussed on the question of whether Tshungu was guilty of insubordination and engaged in activities which hindered company production.

[9] The Arbitrator focused entirely on whether Tshungu addressed the line up without permission and found in this regard that if in fact he had addressed the line-up, Shibambo (sic) was in the room and would have heard what he was talking about. The fact that Shibambo (sic) could not hear what he was saying, implied that on the probabilities he did not speak during the line-up.

[10] In my view it is self-evident that this line of reasoning demonstrates a failure to have regard to the material evidence before the Arbitrator and results in a finding that is tainted by gross – irregularity and is accordingly unreasonable.'

- [22] Mr Myburgh, on behalf of the company, argued, firstly, that the factual findings made by the arbitrator are not supported by the evidence. Secondly, that the commissioner failed to apply his mind to material facts and issues and thirdly, that the arbitrator adopted an erroneous approach to the determination of the factual dispute that confronted him.
- [23] Mr Makinta, on behalf of the appellants, argued that the court *a quo* applied the wrong approach. He submitted that it approached the review application as if it was an appeal.
- [24] The test for substantive unreasonableness was laid down in *Sidumo and Another v Rustenburg Platinum Mines and Others*¹ as follows:

‘Is the decision reached by the decision-maker one that a reasonable decision-maker could not reach?’

- [25] Mr Myburgh submitted that a failure by the arbitrator to apply his mind to the issues before him was a gross irregularity which on its own, without regard to the outcome or result, is sufficient to set aside the award. He not only referred to the minority judgment in *Sidumo* at para 268 but also to a later judgment of the Constitutional Court, *CUSA v TaoYing Metal Industries and Others*² 2009 (2) SA 204 (CC) at para 76, where the notion that an award may be set aside without more, if it is shown that the arbitrator did not apply his/her mind to the issues properly before him or her, was reiterated.
- [26] Although he submitted that *CUSA v TaoYing* *supra* is still good law, he urged us to apply the test as set out in *Herholdt v Nedbank* and the majority in *Sidumo* because this matter can be resolved by applying the approach espoused therein. In *Heroldt v Nedbank* ³it was said:

‘In summary, the position regarding the review of CCMA awards 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

¹ [2007] 12 BLLR 1097 (CC) at para 110.

²

³ 2013 (6) SA 224 (SCA) at para 25.

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 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.'

- [27] A reasonable award is not necessarily a right or correct award. As long as it falls within the range of reasonable decisions that could be made based on the evidence before the decision-maker, there would be no reason to set the award aside. The reviewing court should always guard against substituting its views for those of the decision-maker. It is pre-eminently the task of the CCMA or Bargaining Council commissioners to determine the fairness or otherwise of the dismissal. Commissioners are not expected to give awards that are akin to judgments of the Supreme Court of Appeal or the Constitutional Court. Awards are not meant to be perfect or satisfactory in all respects. The mere fact that an award is unsatisfactory in one or more respects does not mean that it is unreasonable.
- [28] When analysing an award, the reviewing court must look at all the material that was before the commissioner and not only the reasons given by the latter in the award. Where the material before the commissioner shows that there are other reasons, except those mentioned by the commissioner, which render the award reasonable, the reviewing court must consider such evidence.
- [29] Commissioners on the other hand must be mindful of the fact that their awards must be well thought through because their reasons are important to achieve and sustain transparency, accountability and openness in the proceedings before them. A well-reasoned award may convince the person against whom it is made that a review application would not be worth-while whereas a badly reasoned one will in all probability have the opposite effect. *Fidelity Cash Management Services v CCMA and Others* (2008) 29 ILJ 964 (LAC); *Ellerine Holdings Ltd v CCMA and Others* (JA22/2005) [2008] ZALAC

6 (8 May 2008); *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA).

[30] Having considered the award in this matter, it is, in my view, neither necessary nor desirable, on the facts of this matter, to embark on an analysis of the divergent opinions in *Herholdt* and *TaoYing*.

[31] Mr Myburgh submitted that the singular important issue in this matter is the fact that the arbitrator failed to apply his mind to what he called the unchallenged evidence of Windt relating to the confrontation at 8H30 and the fact that Tshungu had previously misconducted himself in a similar fashion. Mr Myburgh submitted that the failure to challenge Windt's evidence is an admission by implication. The arbitrator's failure to consider such a damning admission, so the argument went, is a gross irregularity which led to an unreasonable result. I disagree.

[32] The factual *substratum* for the argument is not solidly based on the facts. Windt's evidence was challenged. Tshungu faced a charge of insubordination. The only evidence presented by the company to prove the misconduct was the events of 2 January 2010. Tshungu's defence was that the company's case was contrived because he did not say anything during the line-up on 2 January 2010.

[33] Mr Mabaso, who appeared on behalf of Tshungu at the arbitration hearing, did challenge Windt's evidence. The relevant part of the arbitration record reads as follows:

'Mr Mabaso: I put it to you that you are confused with your own dates, that is why you do not recall anything.

Mr Windt: I do what?

Mr Mabaso: You are confused with the whole event because the event you are supposed to be complaining with (sic) actually took place on the 3rd where you had a confrontation with Dickson not the 2nd.

Mr Windt: That was on the 2nd I still vividly remember it was a Saturday morning.

Mr Mabaso: I put it to you that you are not a reliable witness in this hearing because you cannot recall anything.'

[34] It is clear that Tshungu's case was that nothing happened between them on the 2nd of January 2010 but that there was a confrontation on the 3rd of January 2010. The particulars of that confrontation, if there was one, were not before the arbitrator. The fact of the matter however is that the testimony relating to the confrontation that purportedly occurred on 2 January 2010 was expressly challenged. It can therefore not be classified as unchallenged evidence or an admission by implication.

[35] Mr Myburgh managed to score an own goal with his submission with regard to Windt's testimony as to what happened at 8H30 on the 2nd of January 2010. In *ABSA Brothers (Pty) Ltd v Moshwana NO and Others*⁴ the following was said about the failure to cross-examine on an important point.

'[39] It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *Van Tonder v Killian NO en Ander* 1992 (1) SA 67 (T) at 72I). He has not only a right to cross-examination but, indeed, also a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19 (A)). A failure to cross-examine may, in general, imply an acceptance of the witness' testimony. In this regard Pretorius has the following to say in 'Cross-examination in South African Law' Butterworths 1997 p149-150 :

"... it is unjust and unfair not to challenge a witness's account if offered the opportunity, then later argue – when it is no longer possible for the witness to defend himself or offer an explanation – that his evidence should not be accepted.

⁴ [2005] 10 BLLR 939 (LAC) at para 39 – 41.

...

...It would create an untenable situation if each witness had to be recalled later to respond to claim emerging from the opponent's case which the witness might be able to elucidate. In the interest of finality and convenience of witnesses, it is clear that all matters must, as far as possible, be dealt with at a single opportunity. There can thus be no doubt that there is a clear responsibility on a cross-examiner to cross-examine if a witness's account is rejected.'

(See also *Small v Smith* 1954 (3) SA 434 (SWA)).

[40] The effect of a failure to cross-examine a witness is instructively dealt with in *R v M* 1946 A.D. 1023 at 1027-1028 where Davis AJA remarked-

"Counsel for the Crown stressed the fact that the defence story was never put to the Crown witnesses, who were hardly cross-examined at all ...In this connection reference may be made to the House of Lords case of *Browne v Dunn*, which is to be found reported in full only in 6 R. 67... but the relevant extracts from the speeches are ... summarized by Phipson, *Evidence* (7th ed., p.460) :-

'As a rule a party should put to each of his opponent's witness in turn so much of his own case as concerns that particular witness, or in which he had a share. . . . If he asks no questions he will, in England, though not perhaps in Ireland, generally be taken to accept the witness's account. . . . Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation. ... Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character...'

These remarks are not intended to lay down any inflexible rules even in civil cases, and in a criminal case still greater latitude should usually be allowed."

[41] It is also apposite to refer to what the Constitutional Court had to say in this regard in *President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1(CC)* at paragraphs 61 and 62. There the Court said :-

“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character... This rule was enunciated by the House of Lords in *Browne v Dunn* [(1893) 6R 67 (HL)] and had been adopted and consistently followed by our courts.

[62] The rule in *Browne v Dunn* is not merely one of professional practice but ‘is essential to fair play and fair dealing with witnesses’....

[63] The precise nature of the imputation should be made to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.’

(See also *Sv Boesak 2001 (1) SACR 1 (CC)* para [26])

[36] I have scoured the record and could not find a single sentence put to Tshungu by the company’s representative at the arbitration hearing, about the conversation between him and Windt at 8H30. The company failed to put what it now calls a “singular important fact” or the most important evidence to Tshungu. No reason was given for the omission. There may be a few reasons why it was not done ranging from the incompetence, forgetfulness or carelessness of the cross-examiner or, on the other hand, it may be that it

was not the company's case that there was a conversation or confrontation at 8H30 on 2 January 2010. In my view, the most sensible explanation, based on the totality of the cross-examination of Tshungu and his witnesses, is that it was never the company's case that the confrontation occurred on that day or in the manner that Windt testified. I say this because the company's version as to what happened at the line-up was put to Tshungu, and he responded thereto.

[37] All the company's witnesses' relevant testimonies i.e. Windt, De Bruin and Shebango were put to him but not a single word was said about Windt's evidence relating to the 8H30 confrontation.

[38] I fail to understand the argument that the arbitrator disregarded the evidence that Tshungu committed the same misconduct in the past. That evidence was irrelevant. The company's case was not that he was insubordinate on more than one occasion. The only evidence about the previous occasions was Windt's evidence to the effect that:

'Yes, he had sort of two times before, he just starts talking without consulting with me, to the line-up.'

When those previous occasions occurred is unknown. Why they were not reported is unknown. The details as to what happened there is unknown. It was also never the company's case that the previous occasions formed part of their case. It does not appear in any of their various review grounds. So, in effect, the arbitrator is criticised for not considering irrelevant evidence.

[39] The court *a quo* found that the arbitrator failed to acknowledge the concession albeit made temporarily by Julius Nome that Tshungu did address the line-up. The concession that the court *a quo* is referring to is more a misunderstanding than a concession. The context to illustrate the point; after Nome testified that Tshungu did not address the line-up, the record reflects the following during his cross-examination:

'Ms Ramafolo: You sat down. Okay. Mr Shebango came here and gave evidence that Dickson took over the line-up and started talking about union activities were you aware of that?

Julius: No

Ms Ramafolo: You were not aware of that. But did Dickson say anything at all?

Julius: No

Ms Ramafolo: Who from the union addressed the workers?

Julius: It was Dickson.

Mr Ramafolo: So Dickson did address. So...

Julius: Not that day, the following day, because there was... (inaudible)...There were an issue which was not finished. If I can remember in fact I remember the following day the applicant did spoke (sic).

Ms Ramafolo: I want to put it to you that according to the evidence that Dickson gave here, that the people were talking about food parcels there is just no way Dickson could have kept his mouth shut about that.

Julius: I cannot remember him talking. What I remember, this issue was raised by one Jame Baloyi. He was talking to the foremen. It was an issue that some of the people did not get food at all and some of them got rotten food.

Ms Ramafolo: That is true. Thank you very much, I do not have any further questions.'

[40] It is clear that Nome made a *bona fide* mistake which he immediately corrected. I am not surprised that Ms Ramafolo, on behalf of the company, did not take it any further. It is clear that she also accepted that it was a mistake. In my view, the court *a quo* erred by classifying the mistake as a temporary concession, if there is such a thing.

[41] At paragraph 8 of its judgment, the court *a quo* said:

'For these reasons it would appear to me that the entire award is focussed on the question of whether Tshungu was guilty of insubordination and engaged in activities which hindered the company's production.'

[42] I must confess, I do not understand this paragraph. Those were the charges that Tshungu faced. The award was supposed to focus on those issues in order to ascertain whether he committed the alleged misconduct.

[43] In paragraph 9 of its judgment, the court *a quo* misdirected itself by stating that the only probability that the arbitrator used to come to his conclusion was the fact that Shebango could not hear. The arbitrator *inter alia* referred to the fact that Windt could not explain what Tshungu was talking about at the line-up. He stated that Mr Nome's evidence was corroborated by Tshungu and the fact that Windt did not report the incident. It is clear that the arbitrator considered and took into account much more than what the court *a quo* said he did. It is also incorrect to say that the arbitrator "focussed entirely" on whether Tshungu addressed the line-up without permission. He also dealt with the loss of production charge. It is clear that the court *a quo*'s criticism of the arbitrator was misplaced. Did the arbitrator apply his mind to the material facts?

[44] The arbitrator was aware that he was faced with two diametrically opposed versions. He was aware that he had to look at the probabilities in order to decide which version to accept and which to reject. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*,⁵ it was said that:

[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a

⁵ 2003 (1) SA 11 (SCA) at paragraph 5.

variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[42] Although the arbitrator did not make express credibility findings in respect of the witnesses, it is clear that he found Tshungu's version probable and therefore credible. This reasoning and award clearly indicate that he found the company's case was improbable and therefore not credible. Was this a decision that a reasonable arbitrator could reach?

[43] Windt testified that Tshungu took over the line-up and discussed "stuff about the union" with the people. It later transpired that he did not understand the language that Tshungu used and therefore had no basis to say he discussed "union stuff". Tshungu's actions, according to Windt, were of such a nature that he felt disrespected and as if he was not in control, yet he did not ask Shebango what Tshungu said. He did not immediately lodge a complaint against Tshungu. He did not report the incident. His conduct was clearly not that of a person who had been disrespected or whose ego was bruised. Even after the 8H30 confrontation when he was invited to lodge a complaint he did not do so.

[44] Shebango's evidence is also improbable. He was in charge of the line-up. He saw Tshungu addressing the line-up. Tshungu did not have his permission to address the workers, but yet he did not reprimand Tshungu. He must have been within hearing range. It is improbable that Tshungu would address the entire shift 'A' employees in a soft and gentle whisper. In fact, Windt testified that "the people was (sic) intimidated by the way that they were spoken to". It is improbable that Tshungu would intimidate co-workers by speaking softly with them. It seems to me, that the arbitrator concluded that Shebango was not being truthful when he said he could see Tshungu speaking but could not hear him. Tshungu also undermined him, yet he paid no mind to what Tshungu was saying.

[45] I have already dealt with the evidence relating to the 8H30 confrontation. It was denied by Tshungu. The company's version was not put to Tshungu. The arbitrator rejected, by implication, Windt's version.

[46] De Bruin's evidence that 20 minutes of production time lost for the day reduced the average platinum carrying material produced by shift 'A' from an average of 2 943 to 460 is highly improbable. In any event, his evidence was clear that equipment failure also contributed to the loss. He could not explain why no loss is attributed to Tshungu's conduct in the official reports. Tshungu also put his version, that he addresses the line-up on 3 January 2010 and not 2 January 2010 to De Bruin. The implication being that he was not responsible for any loss on 2 January 2010. Faced with the shortcomings and lack of proper explanation, the arbitrator's finding that the link between Tshungu's conduct and the loss of production was not shown is one that a reasonable arbitrator could reach.

[47] The arbitrator found that Nome corroborated Tshungu's version. He said the following in this regard:

'The applicant's third witness Mr Nong (sic) testified that the applicant did speak during the line-up. His evidence was supported by the applicant.'

[48] It is clear that the arbitrator omitted the word "not" between did and speak. It must be so otherwise the subsequent sentence would not make sense.

[49] The arbitrator weighed both versions; he considered their respective weaknesses and strengths and concluded that Tshungu's evidence was more probable. He found that the one version was corroborated whereas the other was not. He endeavoured to show that at first glance the company's case seemed solid but if one scratched deeper it became clear that there was more than meets the eye.

[50] It must be remembered that Tshungu's evidence was that he was only informed about the charges on 11 February 2010, one day after he had a heated meeting with the company and one month and nine days after the alleged misconduct. All this happened contrary to the company's guidelines that read as follows:

'The main purpose of a formal hearing is to afford an employee the opportunity to state his/her case.

1. In preparing for an inquiry the following should be ensured:

1.1 The employee should be given 48 hours written notice of the pending enquiry.

1.2 The hearing should be held as soon as reasonably possible, preferably within five (5) days of the alleged offence having come to the employer's attention. The employer must inform the employee of the alleged transgression within forty eight (48) hours of the transgression being drawn to the employer's attention.' (My underlining)

[51] There was no explanation for the delay in this matter. Windt testified as follows during cross-examination:

'Mr Mabaso: What happened on the 3rd January?

Mr Windt: I cannot recall the 3rd January. The only thing I did on the 3rd January that was talk to my superior about what (INAUDIBLE) the charges.'

Although the transcript is incomplete, the only inference that one can draw from the above is that Windt brought the charges under his supervisor's attention on the 3rd of January 2010. The transgression was therefore brought to the company's attention on the 3rd of January 2010 and it did nothing until

the 11th of February 2010. No explanation was given. This obviously strengthened Tshungu's version that the whole matter was contrived as a result of his actions during the meeting of the 10th of February 2010. The arbitrator essentially followed an all or nothing approach. If the company's version was probable then it followed that Tshungu was guilty, if Tshungu's version was probable then he was innocent. He found, based on the probabilities, that Tshungu's version was probable. He therefore rejected the company's version, including the purported 8h30 confrontation, where it contradicted Tshungu's version. This was a reasonable conclusion.

[52] The company bore the *onus* to prove that the dismissal was fair. In my view, the arbitrator's decision that Tshungu did not commit the alleged misconduct on the 2nd of January 2010 is not one which a reasonable arbitrator could not reach. The order of the court *a quo* ought to be set aside because the arbitrator did not commit a material irregularity at all. It is for this reason that I said that the effect of the *dictum* in *Tao Ying* is of no moment on the facts of this matter.

[53] I accordingly make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following:

The application is dismissed with costs.

C J Musi JA

Murphy *et* Setiloane AJJA concur in the judgment of Musi JA

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