

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG.**

CASE NUMBER: JR 492/07

In the matter between:

**GOLD FIELDS MINING SOUTH
AFRICA (PTY) LIMITED PROPERTY
DEVISION**

APPLICANT

AND

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

NSIBANYONI T N.O.

SECOND RESPONDENT

DUZE AM

THIRD RESPONDENT

JUDGEMENT

Molahlehi J

Introduction

- [1] This is a review in terms of which the Applicant seeks an order to review and set aside the arbitration award issued by the Second Respondent under case number GAJB28753-06, dated 5 February 2007.

- [2] In terms of the arbitration award the Commissioner found the dismissal to be both substantively and procedurally unfair. The review application was opposed by the Third Respondent.

Background

- [3] The Third Respondent, who I will refer to as “the employee” in this judgement, was prior to his dismissal employed as an assistant administration officer and an elected member of the Applicant’s hostel residents committee. The charges against the employee read as follows:

“Intimidation-in that on 02 -08-2006 @ + - 14h00 in the Nkululeko Residence kitchen you allegedly threatened to shoot and [k]ill people responsible for organizing the raid that took place on 01-08-2006.

Behavior prejudice (sic) to the maintenance of good order- In that on 02-08-2006 at + - 14h00 in the Nkululeko Residence Kitchen you allegedly tried to incite people to shoot and kill officials responsible for the raid that took place on 01-08-2006 while being in a position of trust as an HRC member.”

- [4] The charges arose from the alleged threatening and disparaging comments made by the employee about the leaders of the National Union of Mine Workers (the NUM). The comments were made in the hostel dining hall on 2 August 2006.
- [5] It was alleged that the employee made the statement to the effect that the NUM leaders deserve to die because they were responsible for the raid that led to the arrest of two of his brothers. The employee is further alleged to have said that the killings that took place at East Driefontein would happen at Goldfields, the Applicant's workplace.
- [6] The allegations were reported to management of the Applicant and thereafter an investigation was initiated which resulted in the charges being proffered against the employee.
- [7] Mr Vimba testified on behalf the Applicant during the arbitration hearing. He testified that the employee joined him and two of his fellow employees, Tendays and Musabe in the dining hall on the day in question. At the time the employee entered the dining hall they were discussing the raid that had taken

place at the hostel. It would seem the raid was conducted against people who were illegally staying in the hostel.

[8] It would appear that the employee entered the dining hall at the point when Vimba was saying that there was nothing wrong with the raid that had been conducted. The employee joined in the discussion and indicated that his brothers were arrested as a result of the raid and blamed the NUM for the arrest.

[9] The employee in his testimony confirmed that he joined the three employees on the day in question and found them discussing the arrest which had been made in the hostel. He testified that during the discussion Musabe enquired from him where he was when the arrests were made. He further testified that whilst he was speaking to Musabe, Vimba interjected and accused him of talking too much. He did not pursue the discussion any further but left for his work station where he continued with his work until knock off at 12H50.

[10] After his dismissal the employee referred an unfair dismissal dispute to the CCMA for conciliation and thereafter to arbitration.

Grounds for review and the award

- [11] After analyzing the evidence before her the Commissioner concluded that the dismissal of the employee was both substantively and procedurally unfair. In her award the Commissioner reasoned as follows:

“According to the evidence led by both parties, there seems to be tension among different tribes which influence the choice of Unions they belong to. However, to dismiss the applicant based on evidence that is contradicted by some of the witnesses is unacceptable. The applicant was therefore victim of this and the respondent relied on evidence that was disputed by other witnesses to the incident between Vimba Linda and the applicant. The respondent should have been more cautious of Vimba’s evidence, considering the fact that Vimba is an active member of NUM.”

- [12] The Applicant in its grounds of review contended that the Commissioner was guilty of misconduct, committed across the regularity, and exceeded her powers as contemplated in section 145 of the Labor Relations Act 66 of 1995 (LRA). The award was accordingly challenged on three grounds.

- [13] The first ground relates to the inference drawn against the Applicant for failing to call Musabe to testify during the arbitration hearing. Musabe is one

of the employees who was in the dining hall and partook in the discussion that led to the employee being charge with intimidation. He testified on behalf of the Applicant at the disciplinary hearing.

[14] An adverse inference can be drawn by the Court or the Commissioner if a party fails to produce a witness who is available to give evidence which is relevant. See *Similane & other v Letamo Estate* (2007) 28 ILJ 2053 (LC), *Glean Eagle Farm Dairy v Schoobe* 149 (1) SA (A) and *SOS Kinder International v Effie Lentin Architects* 1993 (2) SA 481 (Nm HC).

[15] The reason for drawing the adverse inference in a case where a party fails to produce a witness who is available to testify was set out in *Eligin Fire Clays Ltd v Webb* 1947 (4) SA 744(A) at 749 as follows:

“It is true that if a party fails to place evidence of a witness who is available to elucidate the facts before the trial court, this failure leads naturally to the inference that he fears that such evidence would expose facts unfavourable to him. But the inference is only proper one if the evidence is available and would elucidate the facts.”

- [16] Turning to the facts of the present case, there is no evidence on the record indicating that Musabe was available to give evidence and the Applicant deliberately refrained from calling him as a witness.
- [17] It would seem to me that if any inference was to be drawn it ought to be drawn against the employee for not calling Musabe. He testified that Musabe was his witness who could corroborate his version.
- [18] The other inference which the Commissioner drew against the Applicant was failure to produce the clocking card showing the time periods of the movement of the employee between his work station and the dining hall on the day in question. The person who raised the discrepancy was the employee.
- [19] In my view the Commissioner misapplied the rules of evidence and ought not to have drawn the adverse inference against the Applicant for not calling Musabe. The Commissioner also failed to appreciate the task that was before her. The issue of time had little bearing on the issue that the Commissioner had been called upon to determine. The Commissioner focused her mind on the conflicting versions relating to the time the

employee would have been in the dining hall instead of focusing on determining whether the employee had issued threats against the NUM leadership on the day in question. It is common cause that the employee did on the day in question join the three employees in the dining hall and following the discussion the employee had with the other employees a complaint of intimidation was reported to the management.

[20] The second attack on the award concerns the finding of the Commissioner that:

“The respondent should have been more cautious of Vimba’s evidence, considering the fact that Vimba was a member of the NUM.”

[21] This finding shows total lack of appreciation by the Commissioner of the task she was faced with. There is nothing in the record that provides a basis for this conclusion. It was never put to Vimba during the hearing that his evidence was tainted because he was a member of the NUM. In this regard it is apparent that the Commissioner came to this conclusion after considering and reviewing the evidence which was presented at the disciplinary hearing. In other words the Commissioner’s mind focused on what was presented at the disciplinary hearing and not what was before

her. A closer reading of the award reveals that the Commissioner did not consider the evidence which was presented during the arbitration.

[22] The third ground of review is that the Commissioner did not apply her mind to the evidence concerning procedural fairness of the disciplinary hearing.

[23] The record reveals no evidence that the dismissal was procedurally unfair. The employee complained that the procedure was unfair because:

“The Chairperson was the hostel manager. When I requested that maybe they should change a Chairperson to be a white person, then they refused.”

It is evidently clear that the above information cannot constitute evidence or a basis upon which a conclusion could be drawn that the dismissed was procedurally unfair.

[24] I am of the view that for the above reasons the arbitration award stands to be reviewed.

[25] In the premises the following order is made:

- a. The arbitration award issued by the Second Respondent on 5 February 2007 is reviewed and set aside.
- b. The matter is remitted back to the First Respondent for consideration by a Commissioner other than the Second Respondent.
- c. There is no order as to costs.

MOLAHLEHI J

DATE OF HEARING : 23 November 2008

DATE OF JUDGMENT : 07 February 2008

APPEARANCES

For the Applicant : M.P.Makhubela

Instructed by : LEPPAN BEECH INCORPORATED

For the respondent : L. Hollander

Instructed by : NOVENI EDDY KUBAYI INCORPORATED

