

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO.: JR1133/02

Held at BRAAMFONTEIN

In the matter between:

ZOUTSPANSBERG MILLING (PTY) LTD

APPLICANT

and

**COMMISSIONER FOR CONCILIATION, MEDIATION
AND ARBITRATION**

1st RESPONDENT

COMMISSIONER A MAKI

2ND RESPONDENT

P MUNDI

3RD RESPONDENT

DATE OF HEARING : 30 APRIL 2002

DATE OF JUDGMENT : 26 NOVEMBER 2008

FOR THE APPLICANT : P GILLISSEN

JUDGMENT

LANDMAN J:

Introduction

[1] I have no recollection of this matter. It appears from the file cover that it came before me on 30 April 2003 in the Labour Court, Braamfontein and that I reserved judgment until 09:30 on 2 May 2003. On 2 May the matter was postponed *sine die*.

[2] On 23 January 2004 a request to the registrar to enroll this matter on the unopposed roll was filed. It does not seem that the matter was re-enrolled.

[3] On 29 January 2004 an affidavit was filed. It is to the following effect:

“3.2 I have further been informed that the honourable Judge Landman was unable to give judgment on this matter in the absence of a specific map of the premise of the Applicant used during the arbitration proceedings and have I been requested to attempt to locate the said map.

3.3 Having the required knowledge of this map, I have searched all files relating to the Applicant in our offices, enquired from the Applicant himself as to whether he has a copy of this map and also, on several occasions, enquired from the CCMA in Polokwane and also personally visited them, to find the said map or obtain a copy thereof.

3.4 Notwithstanding the above attempts, I have been unable to obtain this map or a copy thereof and does it seem highly unlikely that it still exists.”

[4] The record contains references to a sketch but it is not contained in the file. I accept that this was why judgment was not delivered on 2 May 2003 and a request was made for the sketch to be filed.

- [5] On 21 September 2004 the General and Allied Employers' Organisation wrote to the registrar setting out the problem and concluded the letter by stating; "It is once again hereby requested to schedule an appointment with Judge Landman in chambers to discuss this matter."
- [6] The first time that I became aware of what had transpired in this matter since it was postponed *sine die* on 30 April 2003 was when I received a fax from the Labour Court on 8 August 2008. A letter addressed to the Labour Court by CBE Labour Law Consultants, dated 27 May 2008, was attached to the Labour Court's covering letter dated 7 August 2008.
- [7] I was appointed to the Bophuthatswana Provincial Division of the High Court with effect from 4 August 2004. I did not remember this matter. I made inquiries on 8 August 2008 and learnt that the file was temporarily inaccessible on account of building operations at the Labour Court. I asked that the record be transcribed so that I could attend to the inquiry.
- [8] On 29 September 2008 I again asked the Labour Court whether the file had been traced. On 3 October 2008 my secretary sent a letter asking that only the last five pages of the matter be transcribed so that I could form an idea of what the matter was about. On 23 October 2008 my secretary was informed that the file had been found but that the Court was experiencing difficulty in locating the CD on which the proceedings were recorded. The recording company, Snellers, which was responsible for recording court proceedings, was no longer being used for this purpose.

- [9] On 4 November 2008 I addressed a follow up letter to the Labour Court. On 5 November my secretary received an email from the Court that the recordings could not be retrieved and that a private IT technician was to assist in trying to retrieve the information from cassettes.
- [10] On 21 November I received a call from the Labour Court to the effect that the transcription could not be done and that the file would be couriered to me. I received the file on 24 November.
- [11] I regret that this judgment has been delayed.

The review application

- [12] Zoutspansberg Mills (Pty) Ltd ("the Mill") charged Mr Petrus Mundi for theft committed on 27 October 2001. On 13 November 2001, after a disciplinary hearing, the Mill dismissed him. He referred a dispute to the CCMA. An arbitration hearing was conducted before the second respondent. It seemed to be common cause that the disciplinary hearing was in order but during the arbitration the chairperson of the Mill's disciplinary hearing was accused of bias. The second respondent found that the chairperson had not been biased; the Mill had not proven that Mr Mundi was not supposed to be on the premises while off duty and that the Mill had not shown that he was involved in theft. Mr Mundi was reinstated with back pay.
- [13] The Mill seeks to review and set aside the award.

The facts

- [14] The facts deduced at the arbitration hearing, concerning the alleged theft, are the following.
- [15] Mr Makonde testified. He had worked for the Mill. He was confronted with theft. He admitted to stealing 4x25 kg bags of maize (milled mealie meal). He resigned and wrote a letter to this effect. He said he and Mr Mundi entered the Mill's premises through the metal back door which was defective. They loaded the bags on a wheel barrow. They decided Mr Mundi would walk out through the front gate and buy a loose cigarette while Mr Makondi would push the wheel barrow and its load out through the backdoor. But Mr Makondi was seen by a passerby who called the security guard. This was about 16:00 or, as he puts it "past 4".
- [16] Mr Makonde was not on duty. He had knocked off at 07:00 but he waited in the Mill's yard. Mr Mundi knocked off at 12:00. They both went to the Indian Centre. On the way they agreed to return to the Mill and take two bags of maize each.
- [17] Mr Galetzana is a security guard who was stationed at the Mill by his employer RSR Security. He followed one Viktor when he bought cigarettes and he saw him giving one to Abel Makondi and Petrus Mundi. He did not see bags of maize or a wheelbarrow. While he was upstairs, he saw Mr Makonde on the street pushing a wheelbarrow containing bags of maize. Mr Mundi was walking out of the gate and he "arrested" him for the goods that were in the wheel barrow. Mr Mundi said to him: "Lets drop this case" and added then they will give him something. Mr Galetzana thought to himself that Mr Mundi was coming to him so as to give Mr Makondi a chance to cross with the wheelbarrow and maize. At this stage Mr Makondi

approached them. Mr Mundi explained to him that he had tried to talk to the guard but to no avail. A supervisor approached and Mr Mundi ran away and then Mr Makondi also ran away.

- [18] Mr Mundi says he was at work on 27 October. He knocked off at 12:00. He caught a taxi to Ngebele, also known as Magau, for a funeral. He arrived too late. He spent some time there and returned to the Mill. He entered by the front gate. He said the guard was not there at the time. He washed his working clothes in the company of a fellow employee and left the Mill at about 16:30 or 17:00 or, as he put it, “past 5”. He went to the Indian Centre, using the Mill’s gate and was met by Mr Makondi and the security guard. He was asked whether he could see the wheelbarrow and what was inside. The barrow was covered with plastic. He replied that he could not see what was inside and left. He did not see either Viktor or Mr Makondi inside the premises.

The grounds of review

- [19] The grounds of review are set out in the founding affidavit and summarized in the heads of argument of Mr Gillissen as follows:

- 2.1 That the Second Respondent applied a criminal standard of proof of theft instead deciding the matter of the balance of probabilities;
- 2.2 That the factual finding of the Second Respondent are not supported by the evidence presented during the arbitration;
- 2.3 The Second Respondent failed to consider the crux of the evidence and applied his mind to peripheral issues;
- 2.4 The Second misconstrued the evidence to such an extent that the award as a whole is influenced;
- 2.5 The Second Respondent failed to apply his mind to the material evidence before him;

- 2.6 The Second Respondent's evaluation of the evidence amounts to a gross irregularity and interference with the sanction of dismissal imposed by the Applicant were not based on a rational objective basis;
- 2.7 The Second Applicant misconstrued the crux of the evidence to such an extent that the mistake perpetrates an injustice;
- 2.8 The Applicant will suffer serious prejudice if the awards stands;
- 2.9 The Applicant will be required to reinstate into his employ a person who was guilty of conspiring to steal from the Applicant;
- 2.10 The Second Respondent failed to discharge his function as an arbitrator in evaluating erroneously the evidence."

[20] The sketch would have been useful in visualizing the area of the Mill concerned. But it is not available.

[21] The commissioner was critical of the evidence of Mr Makondi. He noted that he did not mention Mr Mundi in his letter of resignation. It seems that Mr Makondi wrote the letter without assistance. It is doubtful whether it was meant to be a complete statement about the incident. The commissioner contrasted Mr Makondi's evidence with that of the security guard and noted that there was no suggestion that a passerby by had played any role in the discovery of the maize. The commissioner records: "Therefore I do not accept the version of this witness regarding the events, which took place on the 27 October 2001 (sic)." This is essentially a credibility finding.

[22] The commissioner concluded that there was no direct evidence (save that of Mr Makondi) linking Mr Mundi to the theft. The commissioner points out that the security guard apprehended Mr Mundi because he thought he was delaying him while Mr Makondi made a getaway. The commissioner was critical of his testimony because, during the disciplinary hearing, he had not told of his observation while upstairs (which apparently gave him a good view of the street). This too amounts to a credibility finding.

[23] The commissioner was aware of the onus resting upon the Mill to show that the dismissal was substantively fair. The commissioner, in the absence of proof to the contrary, was also satisfied that there was nothing irregular about Mr Mundi being on the Mill's premises after his shift had finished.

[24] The commissioner concluded that the version of Mr Mundi was highly probable ie that he was not associated with the theft, and the version of the Mill was highly improbable and the dismissal was substantively unfair.

[25] The commissioner, in my view, erred in the final paragraph by founding his conclusion on the probabilities when it is clear that, in the view of the commissioner, his credibility findings were decisive. A court of review will not lightly interfere with credibility findings. However, the commissioner's credibility findings do not go to such matters as demeanour. It is possible to judge these findings with reference to the record. The commissioner is justified in raising these complaints but they must be seen in the context of all the evidence presented.

[26] The question is whether, taking all the evidence into account, the second respondent arrived at a conclusion which a reasonable commissioner would not make? In my view the answer must be that a reasonable commissioner would not have arrived at the same decision. I say this because:

- (a) The criticisms of the evidence of Mr Makondi and Mr Galetzana are not on their own such as to make their evidence unacceptable;
- (b) The evidence of Mr Makondi and Mr Galetzana support each other on material aspects.

(c) Mr Mundi's account of his time from 12:00 to about 16:30 is improbable. He left at 12:00 to go by taxi to a funeral, for which he arrived late. He returned to the Mill. Did his washing and was bought a loose cigarette. This improbability points to the untruthfulness of Mr Mundi's account.

[27] The commissioner ought to have found that Mr Mundi was guilty of theft. In the result the application to review and set aside the award of the second respondent is granted.

[28] The award by the second respondent in matter NP 3195/01, dated 13 May 2002, is reviewed and set aside. There will be no order as to costs.

SIGNED AND DATED AT MAFIKENG THIS 26TH DAY OF NOVEMBER 2008.

A A LANDMAN

JUDGE OF THE LABOUR COURT