

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 202/07

In the matter between:

NUM **First applicant**

LUKAS MAKGORO & 12 OTHERS **Second and further applicants**

and

CCMA **First respondent**

R BRACKS N.O. **Second respondent**

VEREENIGING REFRACTORIES (PTY) LTD **Third respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

- [1] The applicants – the National Union of Mineworkers and 13 of its members – applied to review and set aside the arbitration award of the second respondent, Commissioner Raynold Bracks of the CCMA (the first respondent).
- [2] The arbitrator found that the dismissal of the employees by the third respondent, Vereeniging Refractories (Pty) Ltd, was fair because the employees acted dishonestly by fraudulently claiming overtime pay for

time not worked. The arbitrator found that by their actions, the employees violated the trust relationship, which formed the basis of their employment contracts. Both parties were legally represented at the arbitration.

- [3] The applicants submit that the arbitrator committed misconduct, a gross irregularity and exceeded his powers, as envisaged in section 145 of the LRA. They further submit that the arbitrator reached a finding that no reasonable decision maker could have reached, as contemplated in *Sidumo v Rustenburg Platinum Mines Ltd.*¹

BACKGROUND FACTS

- [4] The employees were charged with and found guilty of two charges: of leaving the workplace without clocking out; and representing that they clocked out at 1630, when they were in fact not on the mine premises at the time.
- [5] In addition, the second applicant, Lucas Makgoro, was found guilty of failing to ensure that the workers worked the correct overtime hours. All 13 employees were dismissed in July 2005. The arbitration award was issued on 14 December 2006.²
- [6] The company manufactures a product known as "desolation bricks" which are used in boilers and the steel industry. The other employees reported directly to Lucas Makgoro. His supervisor, in turn, was Edwin Julian, the production manager.³
- [7] The employees are hourly paid workers and are paid according to when they clock in and clock out. If they work overtime, they are obviously entitled to overtime payment. The employees were requested to work

¹ (2007) 28 ILJ 2405 (CC)

² The delay in the period between the issuing of the award and the hearing of the review application is largely due to attempts by the parties to reconstruct a deficient record. It is not clear why there was an 18 month delay between the dismissal and the issuing of the award; however, it was a lengthy arbitration, running over 6 days in a piecemeal fashion in August, October and December 2006.

³ His name is variously given as "Edwin Julian", "Julian Edwin" or "Edwin Julyan". I shall refer to him as "Julian" throughout.

overtime on Friday 15 July 2005. Their normal shift ended at 1430 on a Friday. They were required to work two hours overtime, i.e. until 1630.

- [8] This much is common cause. However, the employees allege that they did work until 1630. The employer disputes this. The employees' clock cards show that they clocked out at 1630. The question is whether they worked until that time or not.
- [9] Julian testified that, at about 1430 – shortly after the employees were instructed to set two extra cars – he went to the plant to see if the work was being done. At Tunnel Kiln (TK) setting where the employees were supposed to be working, he found no-one. He also found that the work had already been done. He then telephoned Lucas Makgoro, the supervisor. Makgoro was not at the plant but in town. Makgoro suggested that the employees could be in the showers at the hostel block, about 200m to 400 m away. Julian went to the hostel block, but found none of the employees there.
- [10] When Julian left the premises between 1530 and 1545, the employees were nowhere to be seen. When he subsequently looked at their clock cards for that Friday, he found that they had all clocked out at 1630, save for one employee who had clocked out at 1631. He testified that, as the work had been completed much earlier, there was no reason for them to remain on the premises, they did not actually work until 1630, and they were not entitled to overtime payments.
- [11] A security officer, Abel Moleleki, also testified at the arbitration. He was stationed at the main gate at 1630 and he did not see any of the employees leaving at that time. The only person that he saw leaving the premises after 1600 was the receptionist. Moleleki left at 1745. His recollection was that most of the employees left at 1430.
- [12] All twelve employees testified that they had worked until 1630. Some of them also testified that it was their understanding that, even if they finished the work in a shorter time, they would still be paid two hours' overtime.

THE AWARD

[13] The arbitrator pointed out that he had two mutually destructive versions before him. He had regard to relevant case law as set out in, *inter alia*, *Plaatjies v Road Accident Fund*⁴ and *WESUSA v Jacobsz*.⁵ In the latter case, Francis AJ⁶ stated:

“The upshot is that I am faced with two conflicting versions, only one of which can be correct. The onus is on the respondent [employer] to prove on a preponderance of probabilities that the employees were dismissed for having taken part in an unprotected strike. The onus will be discharged if the respondent can show credible evidence that his version is the more probable and acceptable. The credibility of the witnesses and the improbability of what they say should not be regarded as separate enquiry to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent's version, an investigation where the question of demeanour and impression are measured against the content of a witness's evidence, where the importance of any discrepancies or contradictions is assessed, and where a particular story is tested against the facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is false and may be rejected safely.”

[14] The arbitrator also took into account that the burden of proof, on a balance of probabilities, that the dismissal was substantively fair, rests on the employer.

[15] Applying these principles to the evidence before him, the arbitrator accepted Julian's evidence that the employees were nowhere to be found when he walked through the plant and the hostel searching for them. The employees in their evidence could not explain why they were not where they were supposed to have been when Julian went to inspect the area. The employees, on the other hand, all confirmed that the work had been done but none of them could say when it was completed. The arbitrator also accepted the security guard's evidence that the employees did not clock out *en masse* at 1630 as reflected on their clock cards. The security guard would have noticed such a mass exit.

⁴ [1999] 1 All SA 162 (SE) 168

⁵ [2000] 8 BLLR 977 (LC) para [39]

⁶ as he then was

- [16] The arbitrator came to the conclusion that the employees must have known that they were paid to work for the full duration of the shift and by absenting themselves they knew that they were "stealing their employer's time".⁷ He did not believe the employees' version that they were instructed to stay on the premises when they had completed the work; and that they would still be paid overtime.
- [17] Regarding the additional charge against Makgoro, the arbitrator was not convinced that Makgoro believed that he could leave the workplace at such a crucial time, since he was the only senior member of management present at the time. This action, the arbitrator found, was a gross dereliction of his duties.
- [18] The arbitrator came to the conclusion that the employer had shown that the dismissal of the employees was fair. With regard to sanction, he took into account that the employees acted dishonestly by not being present at the workplace when they should have been and by clocking out as if they were present at all times. He found that the employees had violated the trust relationship, which forms the basis of the employment contract. He also came to the conclusion that the employees' misconduct had rendered the continuation of the employer/employee relationship impossible. For those reasons, he found the dismissal of the employees to have been substantively fair.

IS THE AWARD REVIEWABLE?

- [19] I have to decide whether the decision reached by the arbitrator is one that a reasonable decision maker could not reach.⁸
- [20] Mr *Boda*, for the employer, drew my attention to the recent decision of the Labour Appeal Court in *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO*⁹. He pointed out that the arbitrator's decision in this case is directly supported by the reasoning of the LAC in that case. The

⁷ Referring to the minority judgment in *CWIU v Boardman Brothers (Natal) (Pty) Ltd* [1995] 3 BLLR 1 (LAC)

⁸ *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC)

⁹ [2010] 5 BLLR (513)

commissioner in *Mutual Construction* had found that the employee had defrauded his employer by altering his timesheets in order to claim overtime payment. Nevertheless, he found dismissal to have been unfair. The LAC found that the employee was not contrite, and did not admit to the misconduct. It found that the altering of his timesheets amounted to gross dishonesty and fraud which was bound to cause harm and prejudice to the employer's business operation. Retaining the employee in the company's employ, in the circumstances, would have been severely detrimental to the company's operational requirements and therefore inappropriate. Ndlovu AJA found that any continued working relationship between the employer and employee was, as a result of the employee's misconduct, rendered intolerable. Accordingly, the court was satisfied that the decision reached by the commissioner in that case – that the dismissal of the employee was unfair -- was indeed one which a reasonable decision-maker could not make. The court found that the employee's misconduct was a fair reason to justify his dismissal.

[21] The facts before me and before the arbitrator in this case are very similar to those in the *Mutual Construction* case. On the evidence before him, having weighed up the probabilities, the conclusion that the arbitrator reached is not one that a reasonable decision maker could not have made. The arbitrator's finding that dismissal was a fair sanction for the misconduct is also not unreasonable.

[22] Similarly, the arbitrator's finding with regard to Makgoro is not unreasonable. Makgoro was meant to supervise the employees until 1630. By this own admission, he was not present. The arbitrator's finding that his actions amounted to gross dereliction of his duties is not unreasonable.

CONCLUSION

[23] On the test as set out in *Sidumo*, the award is not reviewable. There is an ongoing relationship between the National Union of Mineworkers and Vereeniging Refractories. I do not consider it appropriate in law or fairness to order either party to pay the other party's costs.

ORDER

[24] The application for review is dismissed. There is no order as to costs.

STEENKAMP J

Date of hearing: 17 February 2011

Date of judgment: 15 March 2011

For the applicants: Adv MI Manautlala

Instructed by: ES Makinta

For the respondent: Adv FA Boda

Instructed by: Deneys Reitz