

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case No: JR1504/08

Reportable and of interest to other Judges

In the matter between

NORTHAM PLATINUM LIMITED

APPLICANT

and

ML MASHEGO N.O.

FIRST RESPONDENT

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION (“CCMA”)

SECOND RESPONDENT

NATIONAL UNION OF MINeworkERS

(“NUM”) OBO F MOFOKENG

THIRD RESPONDENT

JUDGMENT

SHAI, AJ

INTRODUCTION

[1] This is an application in terms of which the applicant seeks to review and set aside the arbitration award issued by the First Respondent, (“the commissioner”) on the 29 May 2008 under case number LP4908-08 and issued under the auspices of the Second Respondent. In this application the applicant seeks to have the findings of the commissioner that the dismissal of the third respondent (“the employee”) was substantively unfair, set aside and substituted with a finding that the dismissal was for a fair reason.

THE FACTS

[2] The employee, Mr. MF Mofokeng was dismissed for acting dishonestly in relation to clocking in and out of duty, having left his underground at 08h00 on 3 July 2004 without clocking out thereafter misleading a superior about the times of his work on that day in question.

[3] The employee’s clock card showed that he clocked out at 10h36 on 3 July 2004, whereas he was seen by members of the Applicant’s management at the surface at around 08h00 on the day in question. According to Applicant’s management the employee was supposed to be underground on the day since he was employed as a boilermaker in the underground

section of the Applicant's mine.

- [4] The employee was charged and appeared before a disciplinary hearing which resulted in his dismissal. He referred his alleged unfair dismissal to the Second Respondent.
- [5] An award was issued on the 18 April 2006 by Commissioner Francis Kganyago, who found the dismissal of the employee substantively unfair. This award was successfully reviewed by the Applicant and the dispute was remitted to the Second Respondent to be heard by another Commissioner, which happened to be the First Respondent.
- [6] At the arbitration the Applicant called two witnesses. The first was Mr. Albertus Christiaan Teesen who testified that he worked with the employee as a sectional engineer at the time and that he was familiar with the employee. On the 3 July 2004 he saw the employee with one Petrus at the surface around 08h00. He was aware the employee was supposed to be underground at the time carrying out his boilermaker duties.
- [7] When the employee was asked why he was at the surface at that time he said he and Petrus came early that morning and they have received permission from their foreman to work a short shift.
- [8] Mr. Teesen then instructed the foreman to draw a clock history for the

employee which history showed that the employee clocked out at 10h36 on that day and not 08h00. The Applicant regarded this as fraudulent and a breach of Applicant's clocking policy.

[9] Mr. Teesen then phoned the foreman at about 09h00 to ask him why the employee is on surface of the mine since he told him that he had permission to work a short shift.

[10] Mr. Strauss confirmed that he did not give the employee permission to leave early on the 3 July 2004 – he is the person who would normally give such permission.

[11] Mr. Strauss also confirmed that he saw the employee and a certain Petrus around 08h30 at the station area. Mr. Strauss confirmed that the employee did not give him an answer when he asked him what he was doing on surface while he was supposed to be underground and busy with his duties.

[12] The employee denied that he was on surface at 08h00 on 3 July 2004. The employee's evidence is that on that day he went to work 03h45 because he got permission to work a short shift. He went underground at 6h00. He was to knock off at 10h00, and at 10h35 he got out of the underground shaft. He was then instructed to go underground with Petrus,

the electrician, to assist him as he could not go alone underground.

- [13] The employee confirmed that both Mrss Teesen & Strauss saw him at the surface on the 3rd July 2004 but disputed the time they saw him.

GROUND OF REVIEW

- [14] The Applicant raises the following complaints against the Commissioner's award:

"[14.1] The Commissioner failed to consider the testimony of the Applicant's two witnesses in respect of the fact that they had seen the employee on the surface at 08h00 and 08h30 that he was even asked what he was doing there and that other people were instructed to look for the employee underground and they could not find him.

[14.2] The commissioner failed to consider the fact that the employee's failure to clock out properly was the very complaint against the employee and the cause of the disciplinary proceedings instituted against him.

[14.3] The Commissioner misunderstood the evidence to the extend that he found that the employee would have been guilty of

clocking fraud if he had indeed been seen on the surface and the clocking history indicated that he was out of underground earlier than 10h36. If the employee's clock card indicated that he was out of underground earlier than 10h36 at the time he had been seen on the surface, there would not have been any contravention of a workplace rule or any misconduct."

EVALUATION

- [15] The law is now settled with regards to the test for review as enunciated in the well known case of *Sidumo & Another v Rustenburg Platinum Mines LTD & Others* 2008 (2) SA 24(CC) being:

"Is the decision reached by the commissioner one that a reasonable decision maker could not reach?"

- [16] In *Sidumo*, Ncgobo J, as he then was, was of the view that although the provisions of Section 145 of the LRA have been suffused by the Constitutional standard of a reasonable decision maker, a litigant who wishes to challenge the arbitration award under Section 145(2) must found his or her cause of action on one or more of these grounds of review, and at paragraph 86 he said the following:

"The general powers of review of the Labour Court under Section 158(1)(g) are therefore subject to the provisions of Section 145(2)

which prescribe grounds upon which arbitral awards of CCMA Commissioners may be reviewed. These grounds are misconduct by the Commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where Commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA Commissioner's may be reviewed by the Labour Court under Section 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under Section 145(2) must found his or her cause of action on one or more of these grounds of review"

[17] Regarding the gross irregularity as a ground of review Ncgobo J said the following:

"[263] The basic principle was laid down in the often- quoted passage from *Ellis v Morgan* [*Ellis v Morgan, Ellis v Dessan* 1909 TS 576] where the court said:

"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example, some highhanded or mistaken action which has prevented

the aggrieved party from having his case fully and fairly determined”

[18] The Court went further to say that:

“In Goldfields [Goldfield investments LTD and Another v City Council of Johannesburg and Another 1938 TPD 551], Schreinder J distinguished between patent irregularity that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and ‘latent irregularities’, that is, irregularities that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given on the decision maker. In the case of latent irregularities one looks at the reasons not to determine whether the results is correct but to determine whether a gross irregularity occurred during the proceedings. In both cases, it is not necessary intention of the arbitrariness of conduct or any conscious denial of justice.....”

[19] The Court went further to indicate that in both *Ellis and Goldfields* cases it is clear that the crucial enquiry is whether the conduct of the decision maker complained of prevented a fair trial of issues.

[20] In *Southern Sun Hotel Internationals (PTY) LTD v Commission for*

Conciliation, Mediation and Arbitration & Others [2010] 31 ILJ 452(LC), the Court acknowledged the test for review of Commissioner's award as enunciated in the Sidumo decision (reasonable decision maker test) but said:

"Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceedings was achieved, and a right to intervene if the Commissioner's process related to conduct is found wanting. Of course, reasonableness is not irrelevant to this inquiry – the reasonableness requirement is relevant to both process and outcome"

[21] My understanding is therefore that if the Commissioner commits acts as stipulated in Section 145(2) of the Act the decision arising from proceedings so conducted would not be reasonable, thus would not pass the constitutional standard of the reasonable decision maker.

[22] The first complaint of the Applicant is that the Commissioner failed to consider the testimony of the Applicant's two witnesses in respect of fact that they had seen the employee on the surface at 8 o'clock and 08h30 and also that he was even asked what he was doing there and that other people were instructed to look for the employee underground and they could not find him.

[23] The Commissioner dealt with the matter as follows:

“Both Mr. Teesen and Mr. Strauss testified that they saw the Applicant and Petrus on surface. Mr. Teesen says he saw them at 08h00. He even asked them what they were doing there. Mr. Strauss says he saw them at about 08h30. If the Applicant was indeed seen at surface at both the times alleged by the employer’s witnesses then he would be guilty of clocking fraud. The problem is that according to the clocking history submitted into evidence the applicant clocked in at 05h45 and clocked out at 10h30. The clocking history does not show that the applicant was ever out of the underground earlier than 10h36. Mr. Teesen attempted to explain this by saying there is a number of exists from when the applicant would exit. There is no evidence that he indeed did that. Hence the assertion remains speculative on the other hand the applicant testified that those exists are guarded either by security guards or banks men and if one goes through those gates a clock card still has to be used.”

[24] The way the Commissioner dealt with this matter does not show that he had ignored the evidence presented before him. It appears that the commissioner accepted it contrary to the argument by the applicant’s

Counsel that he rejected it. The commissioner accepted it as probable. But the commissioner went further and accepted the evidence of the employee and gave reasons why he accepts it. He accepted it because he is backed by the clocking record which shows that he clocked in at 05h45 and clocked out at 10h36. But he also accepted it because the applicant could not prove that he actually used the other exits and regarded the assertion by Teesen that the employee could have used other gates as speculation more so because the employee testified that such gates are guarded by guards or banks are locked. In this regard it was shown at the arbitration that Mr. Teesen had confirmed at disciplinary hearing that such gates are guarded or locked but at the arbitration he said the applicant could have exited through one of them. This confirmed the evidence of the employee that the exits are guarded or banks are locked.

[25] Further, that it was also contended on behalf of the applicant that the evidence of its second witness, Mr. Strauss corroborates directly that of the first witness Mr. Teesen in so far as seeing the applicant between 08h00 and 08h30 is concerned. However, it was also shown that evidence was not elicited during examination in chief but during cross examination. This surely has to be taken into account in assessing evidence. Mr. Strauss testified that he also told Mr. Teesen this, but when he (Teesen) testified he did not mention this fact. One would have thought that it was

critical for applicant's case that this be said under examination in chief if it was applicant's evidence that it is in fact so. This point was labored at length during arbitration proceedings and the commissioner should have been alive to it when he made his findings.

[26] On the other hand it was also shown that when Teesen met the employee at 08h00 the employee indicated that the reason for him to be at the surface was that he had permission to do short time. When Strauss asked him about he Strauss says he could not tell him the reason.

[27] Despite the weakness of each party's case the commissioner accepted their versions as both equally probable.

[28] The Commissioner was therefore left with two equally probable versions. This he did by evaluating evidence of both parties as aforesaid and determined that both versions are probable.

[29] It was also argued on behalf of the applicant that in arriving at the probabilities the Commissioner failed to make credibility findings. I do not agree. In the case of *NUM and Others v CCMA and Others* [2010] 6 BLLR 681 (LC) Molahlehi J said the following:

"it is trite that in a dismissal case the employer bears the onus of

showing that the dismissal was fair: The starting point for a Commissioner in assessing the versions presented by parties during the arbitration hearing is to determine the extent to which the employer's version is probable than not."

In *Early Bird Farms (PTY) LTD v Mlambo* [1997] 5 BLLR 541 (LAC) at 544, the Court held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that proof on a balance of probability was sufficient. In *Marupala & others v Custeen (PTY) LTD* (199) 29 ILJ 1837 (LAR) [also reported at [1999] 8 BLLR 829 (LC) – Ed, the Court in dealing with the approach to be adopted in dealing with the evaluation of evidence held that:

"The credibility of witnesses and probability or improbability of what they say should not be regarded as separate enquiries to be considered on piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanor and impression are measured against the content of the witnesses evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities that at the end of the day one can say with conviction that one version is more probable

and should be accepted, not that therefore the other version is false and may be rejected with safety”

- see also *Mbhele & Another v Strange Cleaning Services CC (2001) 22 ILJ 2746(CCMA)* at 2751 D-G, where it was also held that the commissioner needs to look at the version of the employer and decide whether it is probable and if he or she is so satisfied must proceed to assess the version of the employee and decide whether it is probable. If he or she is satisfied that it is probable then he or she must compare the two versions to decide which is more probable.

[30] This the commissioner has done, albeit briefly showing where weaknesses are. It must be remembered that in terms of Section 138 of the Labour Relations Act of 1995 commissioners are required only to give brief reasons for their decision. It is sufficient when assessing evidence that he or she indicates why he or she rejects or accepts such evidence. When the commissioner rejects or accepts evidence and gives reasons for it that to me amounts to also credibility findings. The commissioner need not say “I am now making a credibility finding.” If he or she gives reasons for accepting or rejecting the evidence credibility finding is apparent or implied within the same process.

[31] On this ground I find that the commissioner committed no irregularity that warrants interference by this Court.

[32] The second and the third grounds of review are related and they are to the effect that the commissioner misunderstood the evidence and failed to consider the fact that the employee's failure to clock out properly was the very complaint against the employee and the cause of the disciplinary proceedings instituted against him.

[33] Looking at the award it is clear to me that the commissioner understood the matter that was before him. At page 4 of the award the Commissioner says the following:

"Mr. Strauss says he saw them at about 08h30. If the applicant was indeed seen on surface at both the times alleged by the employer's witnesses then he would be guilty of clocking fraud."

[34] The Commissioner captures the crux of the matter under "Background to the issue," as follows:

"According to Mr. Maghekeni the employee was found guilty and dismissed for dishonesty and clocking fraud...."

[35] Mr Sebenzile MaQekeni when he deposed to a founding affidavit on behalf of the applicant said the following at paragraph 8.4. thereof: *"On 25 August 2004 the disciplinary hearing was held and the employee was*

*found guilty of **dishonesty and clocking fraud** (my emphasis).....”*

[36] It is clear that the Commissioner understood the first charge as amounting to fraud, a representation by the employee that he was never on the surface but underground when he was in fact on the surface at the time his clock card showed that he was underground. This in my view is what the applicant sought to prove at the arbitration hearing and it was also so argued in these proceedings. The commissioner said in the award *“the problem is that according to the clocking history submitted into evidence the applicant clocked in at 05h45 and clocked out at 10h36. The clocking history does not show that the applicant was ever out of the underground earlier than 10h36.”* This clearly shows that it was the understanding of the commissioner that if indeed he was seen and if that fact is proven the employee would be guilty of charge one whether one calls it failure to clock or clocking fraud. I see nothing wrong with this understanding by the Commissioner, more so that the applicant through Mr. Maqekeni described the charge as “clocking fraud”, hence no irregularity is committed in this respect.

[37] In the end the question that I have to answer is: has the Commissioner reached a decision that a reasonable decision maker could not reach? The answer is no.

[38] In the premise my order is as follows:

1. The application for review and setting aside of the award issued by the commissioner under case no LP4908-08 is dismissed.
2. I make no order as to costs.

MP SHAI, AJ

DATE OF HEARING: 10 February 2011

DATE OF JUDGMENT: 23 March 2011

FOR THE APPLICANT: Advocate W P Bekker

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