

LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case: JR 1072/09

In the matter between:

ANGLO PLATINUM LIMITED

Applicant

and

NTSIMANE LAMECK MMAPITSA

First Respondent

MOGALE ATTORNEYS

Second Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Third Respondent

BERNARD VAN ECK (N.O.)

Fourth Respondent

JUDGMENT

LAGRANGE, J:

Introduction

- 1] This is an application in terms of Rule 11 of the Labour Court rules to dismiss a review application of an arbitration award. Since the matter first came to court on 8 February 2011, this is the fifth time it has been set down.
- 2] On 8 July 2009 the first respondent, Mr Mmapitsa, launched a review application against an award issued by the CCMA on 16 February 2009. The arbitrator had found Mmapitsa's dismissal by the applicant to have been substantively and

procedurally fair. The review proceedings were launched approximately nine weeks outside of the six-week time period for filing a review application. The employer's attorneys advised Mogale attorneys, Mr Mmapitsa's attorneys at the time, that he would have to file a condonation application for the late filing of his review application.

- 3] The CCMA filed a copy of the record with the registrar of the court in September 2009, but despite a number of requests from the company's attorneys the only response received from Mogale attorneys was that they were not in possession of records from the CCMA. Remarkably, given that it was the first respondent's duty to uplift and transcribe the record, his attorneys further advised the company's attorneys to obtain the record themselves from the CCMA.
- 4] On 12 April 2010, the company launched the application to dismiss the review application, having warned Mogale attorneys that it would apply to have the review application dismissed because the record of the arbitration proceedings had not been filed.
- 5] The application was set down on the unopposed roll on 8 February 2011. A few days before the hearing, Mmapitsa claims that he attended the offices of his erstwhile attorneys where he was advised by Mogale attorneys that he would have to pay them an amount of R 10,000 in fees if he wanted them to proceed with the matter, despite the fact that he believed his litigation was being funded by the insurer Legalwise. As he was unable to pay such an amount, Mogale attorneys would not appear and he had to represent himself on 8 February 2011. By that late stage, still no record had been filed, nor had a condonation application for the late service of the review application been served.
- 6] On 8 February 2011, the court issued a *rule nisi*, returnable a week later on 15

February, calling upon Mogale attorneys to show why a costs order should not be granted against them and why the first respondent should not be refunded any fees he had paid them. Mogale attorneys were also called upon to show cause why the matter should not be referred to the Law Society for investigation regarding their handling of the first respondent's application and their failure to appear in court at the first hearing date.

- 7] At the postponed hearing on 15 February 2011, Mmapitsa was represented by new attorneys and the rule was extended to 18 March 2011. In addition, Mogale attorneys were ordered to provide an explanation on the return day, why no written explanation was furnished for their conduct in the matter. Mogale Attorneys were also ordered to pay the costs occasioned by the extension of the *rule nisi* on an attorney and client scale. The dismissal application was deferred until 18 March 2011 to allow Mmapitsa an opportunity to file his overdue condonation application in respect of the late review proceedings. It must be mentioned that, as far back as July 2009, Mmapitsa's attorneys had been reminded by the applicant's attorneys of the need to file the condonation application.
- 8] On 18 March 2011, it appears that part of the *rule nisi* of 15 February 2011 was confirmed, and the first respondent's erstwhile attorneys were also ordered to pay the costs of the proceedings on that day. The issue of the wasted costs in the dismissal application was postponed until the application was decided.
- 9] The matter was next set down on 30 March 2011 but was again postponed to 12 May 2011, due to the non-appearance of the Mmapitsa's new attorneys of record. Following what has become a pattern in these proceedings, the new attorneys were ordered to pay the wasted costs of 30 March 2011 hearing on a scale *de boniis propriis* and to file an affidavit explaining their non-appearance on that occasion.

10] On 12 May 2011, the fifth and final day scheduled for this hearing, the dismissal application finally fell to be determined. On 4 March 2011, the first respondent belatedly filed his condonation affidavit for the late filing of the review application, some twenty-three months after it should have been done.

Evaluation

The delays in prosecuting the review application

11] The first striking fact is that there is no evidence Mmapitsa directed any enquiries to his attorneys about the progress of his matter between 23 April 2009, when he deposed to his founding affidavit, and on 5 February 2011, when he consulted with his attorneys again. While his erstwhile attorneys' conduct appears to have been grossly negligent, it also cannot be said that Mmapitsa made any attempt to make sure that the matter was progressing. The consultation on 5 February 2011, when the first hearing was upon them, was initiated not by him but by his attorneys. Mogale Attorneys' own conduct in failing to reply to the enquiries from the applicant's attorneys about the filing of the record and advising the latter to obtain a copy of the record themselves from the CCMA demonstrates that they conducted the proceedings with a reckless disregard for their own client's best interests and for the rules of this court.

12] The record was available for transcription in September 2010. To date, it has still not been filed. This alone is sufficient reason for not prolonging this matter any further in my view. In addition, there is no proper explanation for the initial delay in launching the review proceedings, nearly two months late. In other words, after the arbitration award had been handed down, it took the first respondent nearly three-and-a-half months to launch the review application. The applicant did have legal insurance and, at least in the initial stages of this litigation, legal costs ought not to have been an obstacle to him proceeding with the matter.

- 13] Mmapitsa essentially cannot provide any explanation for the late filing of the review application, but attributes any blame for this to his former attorneys. There is no indication that he attempted to obtain the explanation from them when he finally consulted them on 5 February 2011.

Merits of the review application

The award

- 14] It is not necessary for the purposes of this application to determine if Mmapitsa would probably succeed with his review application. It is simply enough to consider whether he has reasonable prospects of doing so. The only material available to the court on the merits of the review is the arbitration award itself, the founding affidavits in the review application and what can be gleaned from the employer's affidavits.
- 15] Mmapitsa was found guilty of soliciting and receiving money from two job applicants at the company in return for promises that he would ensure that the job applicants passed certain physical pre-recruitment tests, which the employer conducted.
- 16] The arbitrator's evaluation of the evidence led him to conclude that the employer's version was the most probable one in the circumstances. He found the evidence of the employee complainants to be "most convincing", and dismissed the applicant's evidence as "a pack of lies". While the arbitrator's characterisation of the applicant's evidence is described in unnecessarily emotive terms, he justifies his conclusion, saying that the complainants gave consistent versions of what transpired on the day in question, whereas Mmapitsa's evidence was simply a

blanket denial. Mmapitsa's defence was merely that he had never met the two complainants in his life. This bald denial contrasted with their elaborate and detailed evidence.

17] Of course if nothing of the kind had happened, as Mmapitsa testified, then the inescapable conclusion which follows from that is that there must have been an elaborate scheme that was devised to falsely implicate him. Nothing in the arbitrator's account of the evidence reveals that Mmapitsa provided any explanation why false claims would have been made by the two complainants, nor why the company would have tried to persecute him. He merely testified that he had never met the complainants before the hearing. By contrast, it is easier to understand why the complainants would have reported the matter if their evidence was true: they had been promised that they would "pass" the physical tests in return for making certain payments to Mmapitsa. In both cases, they alleged he had not kept his side of the deal, whereas they had both paid him an amount of R 250-00. In consequence, they would have been out of pocket without anything in return for their outlay.

18] There was also additional evidence given by one Ms Masemong, a girl friend of one of the complainants. She claimed that she had taken money at the request of one of the complainants to the mine hospital and handed it to a man wearing a Bafana Bafana t-shirt. She said she never met the individual before, but could recognise him at any time afterwards. The complainant in question had described Mmapitsa to her as a person wearing the t-shirt. The arbitrator found that Masemong's evidence and the complainant's evidence corroborated each other and he had no doubt that the person wearing the Bafana Bafana t-shirt on that day in question, who accepted the money from Masemong, must have been Mmapitsa.

The grounds of review

- 19] As is often the case in review applications, some of Mmapitsa's grounds of review are stated in the broadest terms. Where no factual basis for these claims has been provided they cannot be taken seriously. Apart from these generalised grounds of review, Mmapitsa does advance a few more specific ones. The company rightly criticises some of these grounds as being, properly speaking, grounds of appeal rather than grounds of review.
- 20] Mmapitsa complains that the arbitrator took no account of his record and the prejudice he would suffer if dismissed. However, the arbitrator notes in paragraph [3.9] of his award that the only issue disputed by Mmapitsa at the arbitration was the finding of guilt. There is no basis advanced to suggest any other contention was raised before the arbitrator regarding the substantive fairness of his dismissal. In the circumstances, I have no factual basis for believing that the arbitrator was expected to determine any other issue in relation to the fairness of the dismissal, and this ground of review must fail.
- 21] The other specific grounds of review raised by Mmapitsa all relate to the arbitrator's assessment of the evidence of Masemong in identifying him as the person to whom money was given at the hospital. Essentially he feels that the arbitrator did not give proper consideration to her evidence by which he was identified solely as the person wearing a Bafana Bafana t-shirt to whom she gave the money. He points out that there could have been other persons wearing such a t-shirt and that this was the only basis on which he was identified. As mentioned, the applicant approaches this issue more in the form of a ground of appeal, but I will assume for the purposes of assessing the merits of his review application, that he is simply saying the arbitrator failed to have regard to the evidentiary value of this portion of her testimony.

22] I cannot say the arbitrator's evaluation of Masimong's evidence about the recipient of the money wearing a Bafana Bafana t-shirt in some way entailed the commission of a reviewable error. The arbitrator clearly considered the two key pieces of Masimong's evidence: she said she had been told to give the money to a man wearing such a t-shirt at the hospital, and that such an individual accepted the money, apparently without question or query. Moreover, the arbitrator found that Masimong's evidence and that of the complainant, Mr Palahadi, corroborated each other. Accordingly, Masimong's evidence was clearly evaluated in the context of Palahadi's own evidence that he had asked Masimong to give the money to a man wearing a Bafana Bafana t-shirt. Against Mmapitsa's bald denial of interacting with either of them, he found their version was more probable in his view. To suggest that Mmapitsa was identified merely by the t-shirt he wore is to oversimplify the context in which Masimong's evidence was given. She not only saw such a person but gave money to him in accordance with Palahadi's instruction.

23] Mmapitsa also takes issue with the fact that the arbitrator did not appear to have treated Masimong's evidence with caution when he ought to have given the 'manner in which she was brought into the proceedings'. Once again, why this would constitute a ground of review rather than one of appeal is difficult to fathom, but I will assume Mmapitsa is attacking whether or not the arbitrator was reasonable in not treating her evidence with caution.

24] In the absence of elaboration by Mmapitsa, the 'manner' in which Masimong came to testify at the arbitration, can only refer the fact that she was subpoenaed to give evidence at the arbitration. The fact that she was subpoenaed to give evidence suggests she might have been reluctant to testify. A reluctance to testify can be for many reasons, and there is no evidence before me to suggest that the particular reason for having to subpoena Masimong should have raised concerns about the

reliability of her testimony. Certainly, there is no general rule that a subpoenaed witnesses's evidence must necessarily be treated with caution.

25] In the result, the specific grounds of review raised by Mmapitsa, if indeed they qualify as such, are insubstantial and it cannot be said he has demonstrated reasonable prospects of succeeding.

26] In the circumstances, the arbitrator's conclusions seem entirely reasonable ones to have drawn.

Conclusion

27] Mr Mmapitsa and his former attorneys are jointly responsible for inordinate delays in prosecuting the matter, for which no reasonable explanation is given. Even at this late stage, a record of the arbitration proceedings has still not been filed. Secondly the merits of the review application, on the material before me are not at all promising. In the circumstances, there is no good reason advanced for the various delays in the matter and the first respondent himself is far from blameless, irrespective of the negligence of his former legal representatives. Even if the merits in this matter were sparkling, I believe the court would be condoning an abuse of court process to allow the review application to proceed any further. All things considered, the review application stands to be dismissed.

Costs

28] The applicant's current attorneys of record, Phambane Mokone Incorporated, did not file an explanatory affidavit regarding their failure to attend the previous proceedings on 30 March 2011. In the circumstances, I see no reason why they should not also have to pay the applicant's wasted costs of attending and representing the applicant at the hearing on 12 May 2011, since no justification has been provided why the matter could not proceed on 30 March 2011.

Order

29] Consequently the following order is made:

- a. The first respondent's review application in respect of the arbitration award issued by the fourth respondent on 16 February 2009 under case number LP 3863-07 is dismissed.
- b. The first respondent's attorneys of record are ordered to pay the applicant's costs of representing the applicant on 15 March 2011.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 12 May 2011

Date of judgment: 07 July 2011

Representation

**For the Applicant: I Gwaunza
of Edward Nathan Sonnenberg**

For the Respondent:

**T Makgate instructed by
Phamabane Mokone Attorneys**