

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No: JR 435/08

Reportable and of interest to other judges

In the matter between:

NORTHAM PLATINUM MINES

Applicant

and

P SHAI (N.O.)

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

NUM obo P SENYATSI

Third Respondent

JUDGMENT

HEAD NOTES: (review - cautionary rule - single witness - set aside)

LAGRANGE, J

Introduction

^{1]} On 3 November 2011, I handed down the following order with a summary of my findings, which appears at the end of these full reasons for the judgment:

“In the circumstances,

- a. The arbitration award of the first respondent issued on 17 March 2008 under CCMA case number LP 2308-04 is reviewed and set aside.

The findings of the arbitrator are substituted with a finding that the third respondent’s dismissal was substantively fair.

No order is made as to costs.”

2] The applicant company applied to set aside and review an arbitration award by the first respondent handed down on 1 January 2008 under CCMA case number LP2308 - 04. The third respondent, Mr P Senyatsi, was dismissed by the applicant after being found guilty of decanting a sample and using unmarked containers and without using identification tags for the samples he was handling. Senyatsi was employed as a sampler by the applicant and was fully conversant with what was required of him in the performance of his duties. The samples in question are production samples which are taken at regular intervals to determine the production quality. Errors or inaccuracies in the measuring of samples which produce misleading results about the product quality can result in decisions being taken with serious financial implications. The samples are collected in the form of a muddy slurry.

3] The charges arose from an incident on 18 April 2004. The plant supervisor, Mr PJ Swart, said he observed Senyatsi sitting on his heels decanting a sample bucket some 10 or 20 m from stairs leading up to the laboratory where tests are conducted on the samples. The effect of decanting a sample, apart from reducing the weight of the bucket, is that the sample measured would give an inaccurate reading of the

quality of output. The plant supervisor then followed Senyatsi up the stairs to the lab where he observed him preparing the remainder of the sample from the bucket which he had decanted for testing. At this point he stopped him from proceeding further.

4] Swart testified that the marking of the sample in the bucket showed a clear 'V' mark indicating that the slurry had been poured from the bucket. If the bucket had been dropped as Senyatsi alleged, there would have been splash marks and not clean lines on the rim of the bucket.

5] At that stage Swart called another sampler, one 'Stanley', to verify the markings of the slurry on the bucket which Senyatsi had allegedly decanted and to observe the spot where the decanting had taken place. He was not called as a witness at the arbitration.

6] Swart advised Senyatsi orally that he would be charging him with decanting a sample. Swart also testified that it was impossible to determine if there had been contamination of a sample without doing laboratory tests.

7] Later the same day, Senyatsi was observed decanting a sample yet again. This time he was observed by Breidenbach who whistled at him to catch his attention and interrupted him in what he was doing. Breidenbach reported this incident to Swart, but the latter said he would not take it any further because he had already charged Senyatsi for the incident earlier that day which he had observed. Breidenbach also called two colleagues to confirm the decanting, but they were not called to confirm his testimony at the arbitration. According to Breidenbach, Senyatsi told him he had slipped and fallen.

8] Senyatsi's account, as recorded by the arbitrator, is that he was taking two samples of concentrate to the lab and while walking he tripped and fell. When he fell the sample fell as well and some spillage occurred. He inspected the samples to see if any contamination occurred. He maintained that he could identify contamination simply by examining the samples himself as he worked with them all the time.

9] At that stage, he was approximately 12 m away from the laboratory

having carried the samples some 100 odd metres by then. He thought that Swart saw him and did not think it was necessary to report the incident as he should have because he had been seen by the plant supervisor. He took the 25 litre container and emptied it in the laboratory drainage then washed it out with water, which caused Swart to become angry. The applicant had emptied the container because he intended to take new samples as contamination of the samples had occurred as a result of the spillage when he slipped. He denied that he had been decanting a sample when he had been seen sitting with the bucket by Swart.

^{10]} According to the arbitrator, Senyatsi also denied ever saying to either Swart or to Breidenbach that he had tripped and fallen which resulted in a spillage. When asked what motive Breidenbach or Swart might have for implicating him falsely in tampering with samples by decanting them, Senyatsi could not identify any reason why Breidenbach would have said what he did, but believed that Swart had an agenda to implicate him because previously Swart had found him not guilty on another charge of decanting a sample, when Swart had been the chairperson of the disciplinary enquiry.

¹¹]The crux of the dispute was about the decanting of the sample, which was a dismissable offence. There was no dispute that the sample had not been properly tagged and the buckets were not marked, but it was also agreed those acts did not amount to dismissable misconduct.

The arbitrator's evaluation

¹²] The arbitrator accepted that the applicant had admitted his guilt on the lesser charges of not tagging and labelling the samples and confirmed the findings of the chairperson of the disciplinary enquiry in that respect.

¹³]He noted that none of the witnesses who corroborated Swart or Breidenbach's evidence at the internal inquiry were called to testify at the arbitration and therefore correctly found that Swart's and Breidenbach's account of their testimony was hearsay. He also observed that no reasons were given why they were not called to corroborate the testimony.

^{14]}The arbitrator mentioned that Senyatsi had contradicted his earlier version at the disciplinary enquiry about why he did not report his fall as he was supposed to. At the enquiry he had said he did not report it because Swart was angry with him, whereas now he said it was because he was aware Swart had seen him. In evaluating the evidence of Swart and Breidenbach, the arbitrator accepted that there were no contradictions in their evidence. On the question of whether Swart had a motive to falsely implicate Senyatsi because he had previously acquitted him on the same charge when he chaired a disciplinary enquiry, the arbitrator held that he could either infer from this that Swart was “...a fair person, secondly may have had a motive to implicate the applicant to make up for the previous finding as the applicant suggested.” (sic)

^{15]}Although he accepted that the evidence of the Breidenbach was not contradictory the arbitrator held that it was unlikely he could have seen what Senyatsi was doing from a distance of 80-100metres, and he also found it was unlikely that Senyatsi had the same explanation for what had happened when Breidenbach observed him, when he had already

given the same explanation in the morning to Swart for the earlier incident and was facing charges for this. He also found it strange that Senyatsi was not charged for this second incident as well.

^{16]}As mentioned, the arbitrator was also concerned about what he described as the lack of corroboration of the evidence of Swart and Breidenbach and the lack of any explanation for the non-attendance of the witnesses who previously corroborated their respective accounts in the disciplinary enquiry. Lastly, he was concerned why Senyatsi would have waited until he was within 12 metres of the stairs to the laboratory before he decanted the sample if he wanted to minimise the weight of the samples.

^{17]}The arbitrator agreed that the evidence of Senyatsi was contradictory on his explanation for failing to report the incident to his supervisor but accepted his explanation for the contradiction that it happened a long time ago. He found a similar discrepancy with the evidence of the Swart in that he had used the word 'pitter' in the previous enquiry whereas he referred to 'decanting' in the arbitration. He decided this was also attributable to a lapse in the time between the two hearings.

Having made this finding the arbitrator then equated the two discrepancies and found the contradictions in both Senyatsi and Swart's evidence were not material.

^{18]} Having found the applicant not guilty the arbitrator proceeded to reinstate Senyatsi with a final written warning. Although it was argued by Mr Bekker, who appeared for the applicant that it was inconsistent for the arbitrator to acquit Senyatsi but to issue him with a final warning, on closer examination it appears that the arbitrator issued the warning for the lesser offences of not marking the buckets and tagging the samples. This is evident from paragraph 7.14 of his award where he stated: *"What remains is the determination of whether dismissal is for a fair sanction for the commission of the admitted offences namely: using unmarked containers and the failure to use identifying tags."*

^{19]} In concluding his evaluation, the arbitrator stated:

"7.13 Taking into account what I said above and taking into account the fact that all witnesses are single witnesses and cautionary rule applies thereto I have come to the conclusion that both versions are

equally probable. In other words the evidence is reasonably balanced. The onus lies with the respondent to prove on a balance of probabilities that the applicant has committed the offence and therefore the dismissal is fair. In the circumstance the respondent fails.” (sic)

Grounds of Review

^{20]} The applicant attacks the arbitrator’s findings in respect of whether Swart had a motive to implicate Senyatsi on account of the previous enquiry in which he had acquitted Senyatsi. I agree with the submissions made by the union on Senyatsi’s behalf that the arbitrator did not go so far as to actually make a finding that he had an improper motive, but I am also not persuaded it had no bearing on the outcome of the arbitrator’s decision because he then failed to take this into account in considering the credibility of Swart’s testimony when weighing the two versions.

^{21]} Despite supposedly leaving the question of bias open, the arbitrator said he was concerned about the fact that Swart chaired the previous

hearing. He posited two possible inferences that may be drawn from that fact: one that Swart was fair, and the other that he may have tried to implicate Senyatsi to make up for the previous acquittal. By suggesting both possibilities were equally plausible, it is also difficult to escape the inference that the arbitrator took the view that there remained a question mark over whether or not Swart had an ulterior motive.

22] In truth, the inference that Swart was trying to make up for the previous enquiry was simply not a reasonable one, in the absence of other evidence tending to show that Swart regretted not being able to find Senyatsi guilty. I agree with the applicant that the inference he postulates was a logical *non sequitur* on the evidence available and at the very least he should have accepted that there was no adverse inference that could have been drawn on what he had before him.

23] I further agree that it was never put to Swart directly that he had an improper motive in seeking to implicate Senyatsi, which should have been done and the arbitrator failed to consider this in considering the issue of improper motive. This was all the more reason for the arbitrator

not to have considered the possibility that an adverse inference might be drawn from Swart's acquittal of Senyatsi at the previous inquiry. By leaving the issue open ended, instead of deciding if there was any reason why Swart would have falsely implicated Senyatsi, the arbitrator acted unfairly towards the applicant, because the evidence of Senyatsi's previous enquiry, clearly supported a positive finding on Swart's credibility.

^{24]}A similar issue is raised in relation to the critical evidence concerning the shape of the residue rim of the sample in the container. Swart's testimony about the circular stain on the floor and distinctive 'V' shape in the bucket, which was strongly indicative of decanting, rather than spilling caused by dropping the bucket, which would have left a splash pattern, was not tested in cross-examination, but only contradicted by Senyatsi in his evidence in chief. Senyatsi was represented by an attorney at the time and this was crucial evidence he should have tested Swart on. The arbitrator seems not to have taken this into account when weighing the evidence on this issue.

^{25]}Moreover, it is telling that the arbitrator failed to make a finding on this

conflicting evidence which he ought to have because it was fundamental to his task of deciding if the charge of decanting the sample was proven or not.

26] Once more, when he dealt with what happened immediately following the alleged decanting incident, the arbitrator did not evaluate the evidence in the light of the failure to put Senyatsi's denial of any confrontation over the decanting to Swart. Similar criticisms can be made of the failure to confront Swart when he testified that contamination could only be detected by analysis, whereas Senyatsi said in his testimony he could identify contamination simply based on his knowledge of working with the samples. Likewise, the applicant rightly criticises the arbitrator for making a finding about Swart's ability to observe what Senyatsi was doing when this was never challenged during the hearing and was not even raised by Senyatsi.

27] In relation to the arbitrator's finding that it is unlikely the applicant would have waited until he got near the stairs to the laboratory to decant some of the sample on account of its weight, the applicant submits that the arbitrator ignored Swart's uncontested evidence that

Senyatsi should only have been carrying one sample bucket whereas he was carrying four. The arbitrator failed to consider that it is equally possible that, when faced with ascending the stairs with this load, Senyatsi would have sought to lighten it by decanting some of the contents of largest bucket before proceeding further.

28]The applicant also claims the arbitrator failed to appreciate that the evidence of Breidenbach corroborated that of Swart, in the sense that it showed a propensity of Senyatsi to decant samples. The applicant claims that the arbitrator ignored this facet of their evidence. Implicitly, it argues that this offsets any concerns the arbitrator might have had about the absence of the previous witnesses' testimony which directly corroborated Swart and Breidenbach's evidence. In my view it was not unreasonable for the arbitrator to have had concerns that none of the other witnesses who had previously corroborated Swart and Breidenbach's evidence were called, without any explanation.

29]The arbitrator's concern about the lack of corroboration in turn affected his weighing of the probabilities. In paragraph 7.13 of his award the arbitrator concluded:

"Taking into account what I said above and taking into account the fact that all witnesses are single witnesses and cautionary rule apply thereto I have come to the conclusion that both versions are equally probable. In other words the evidence is balanced. The onus lies with the respondent to prove on a balance of probabilities that the applicant has committed an offence and therefore the dismissal is fair. In the circumstances the respondent fails." (sic)

30] In **S v Carolus 2008 (2) SACR 207 (SCA)**, the SCA summarised the current interpretation of the cautionary rule relating to evaluating the evidence of a single witness in criminal matters. The current interpretation differs significantly from the previous more stringent standard of requiring a single witness's evidence to be "clear and satisfactory in every respect" before it could be relied on for a conviction:

"There is no formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits

and, having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects or contradictions in the evidence.”¹

31] In applying the cautionary rule, the arbitrator in this instance simply treated the evidence of Swart and Breidenbach, compared with that of Senyatsi, in nominal and monolithic terms: each incident had one witness for the applicant and one for the third respondent and accordingly the evidence for each party was of equal value and the probabilities were balanced in the absence of independent corroboration by other witnesses. The arbitrator ought to have weighed the probabilities of the respective versions and if necessary made credibility findings to arrive at an outcome. Implicitly, the arbitrator took the absence of independent corroboration of Breidenbach and Swart’s versions to have been fatal instead of applying a more nuanced evaluation of the single witnesses’ evidence in keeping with the principles laid down by the SCA in *Carolus*.

32] There was no obligation on the applicant to lead evidence of all

¹ At 211-212, [15]. The court relied *inter alia* directly on the early and more extensive consideration of the rule in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E – G as authority for this proposition.

available witnesses. If it was satisfied that a witnesses' evidence remained fundamentally intact after cross-examination, it did not have to lead further corroborative evidence.

33]The 'corroborative' character of Breidenbach's evidence in relation to Swart's is of a different character because it was led to try to show a propensity on Senyatsi's part to decant samples, rather than for the purpose of directly confirming the respective eyewitness testimony of Swart and Breidenbach. I do not think that the arbitrator erred in failing to treat this evidence as a substitute for the corroborative evidence of other eyewitnesses to the two incidents Swart and Breidenbach testified to.

Conclusions

34]It is well established that a failure to put to a witness the version of witnesses of the opposing party who are yet to testify is a reviewable irregularity², assuming of course that the witness is in a position to

² See in this regard: *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 137I-138A; *Absa Brokers (Pty) Ltd v Moshoana NO & others* [*\(2005\) 26 ILJ 1652 \(LAC\)*](#)[*\(2005\) 26 ILJ 1652 \(LAC\)*](#) ; [2005] 10 BLLR 939 (LAC) at paras 38-42 and *Southern Sun Hotel Interests (Pty) Ltd v CCMA &*

comment on those versions. As discussed above, the arbitrator failed to consider this in respect of important issues, namely in deciding that the question of Swart's bias was an open ended matter, in deciding on the contours of the sample residue in the bucket and the shape of the pattern of spilled liquid, and in considering whether a confrontation had taken place between Swart and Senyatsi immediately after the incident. Also, the arbitrator failed to consider the fact that it was never put to Swart that he could not observe what Senyatsi was doing, yet this played a significant role in reaching his findings.

35] Further, in Swart's testimony he had testified that the third respondent could never have replaced the 25 litre sample during the 20 minutes he was present at the laboratory because it was an auto sample. It was only in his own testimony that Senyatsi then said the sample was a hand sample, but this was never put to Swart. The arbitrator's failure to consider these facts which were relevant and material to the issues at hand amounted to an irregularity in his conduct of the arbitration.

36] Secondly, the arbitrator failed to determine the question whether or not the third respondent had decanted or spilled the contents of the 25 litre

sample bucket, which was a central issue to determine.

37] Lastly, the arbitrator neutralised the effect of the evidence that Swart had previously acquitted the third respondent of the same misconduct, by entertaining as a real possibility the illogical inference that Swart had a reason to 'make up for' the previous acquittal, when there was no independent evidence supporting such an ulterior motive. Had there been, there would have been some justification for the inference, but in the absence of any other evidence, the only inference that was justified on the evidence was that Swart was not malicious but, in fact, was fair minded.

38] In the circumstances there are good reasons to set aside the award and substitute it.

Re-evaluation

39] To some extent the reconsideration of the evidence is anticipated in the analysis above. The factors below seem crucial in re-evaluating the case.

The arbitrator rightly accepted that the evidence of Swart and Breidenbach was not contradictory. In so far as he found that Swart's evidence might have suffered from the defects of memory because he had used the word 'pitting' rather than 'decanting' in the original enquiry, this was based on a misunderstanding. As Swart testified in the arbitration the word he used in the enquiry was 'peuter' which is an Afrikaans word for fiddling about or tampering with something. Moreover it was used in the context of explaining why he did not suspend Senyatsi immediately, since there was no possibility of him tampering with the evidence.

40] On the other hand the inconsistencies in the applicant's accounts were significant.

41] In the original hearing Senyatsi admitted there were "mud straight lines" in the sample bucket. In the company inquiry Senyatsi also said he did not mention to Swart that he had spilled the sample between the number 1 and 2 conditioners, rather than between the number 2 conditioner and the laboratory, because Swart was so angry. Later in his evidence at the arbitration he suggested there had only been one

spillage.

4.2] Senyatsi also claimed that Swart's anger was the reason he did not report the incident, whereas in the arbitration he claimed he did not report the accident because Swart had seen him, and only mentioned Swart being angry when he stopped him processing the sample. He did not deny being shown the trace of the sample being spilled or poured between number 1 and 2 conditioner, a location which was not near the steps where he claimed to have mis-stepped.

4.3] At the commencement of the arbitration Senyatsi's attorney said that his version would be that when he tripped coming down the stairs he spilt one of the samples and poured some out from one of the containers to determine which one had spilled. Later, it was put to Swart that Senyatsi wanted to see if the two samples had become mixed, to which Swart responded that it would not be possible to detect this by mere observation of the samples. Still later it was suggested to Swart that the applicant had been pouring out the sample to check if there had been any contamination, to see if it was necessary to discard the sample, and that if there had been no spillage in fact that would

explain a straight line pattern on the rim of the sample bucket. Still later it was said that there had been a spillage and in order to see if there was contamination he spilled some more out yet he was still not sure it had in fact spilled out.

4.4.] In his own evidence in chief, Senyatsi claimed that when he fell on the stairs there had been a spillage and a contamination and that thereafter he took the buckets to laboratory. He makes no mention of pouring any out to verify the spillage or contamination, and later denied decanting any of the sample. Consistent with this version he then denied that the rim of the slurry in the sample bucket had displayed a 'V' shape, but rather it displayed a spotted pattern consistent with a spill. He did not deny that he had been shown the bucket by Swart in the presence of another colleague.

4.5] What emerges from the above is that the applicant's version changed between the internal hearing and the arbitration, and the version he put to Swart was not the same that he testified to. Importantly also, material parts of his testimony were not put to Swart, such as the fact that he would say there was in fact a splash pattern in the bucket.

Moreover, the inconsistencies go to the heart of the question of whether he had accidentally spilled some of the sample or had decanted it.

46] In contrast, as the arbitrator observed, there were no contradictions in Swart's evidence. Without even going into the credibility of the witnesses, Swart's version is more internally coherent than Senyatsi's internally contradictory version. Further, Senyatsi did not give a convincing explanation for his failure to get permission from Swart, in the absence of his supervisor, to obtain a second sample. Nor does he satisfactorily explain when he could have slipped away from Swart in the laboratory to obtain a second sample.

47] Then there is the question of the relative credibility of the Swart and Senyatsi as witnesses. The inference that Swart had no reason to maliciously implicate Senyatsi follows from the fact that he previously acquitted him on the very same charge and there is no reason to believe he manufactured his evidence. Senyatsi's incoherent and constantly changing version, by contrast, renders his evidence less credible.

48] In all the circumstances, I am satisfied that the applicant proved its case on the first charge on a balance of probabilities. The fact that Senyatsi was more than proficient when it came to a knowledge of his duties, and was aware of the seriousness of decanting samples having previously faced an enquiry for the same misconduct, and the fact that he was observed by Breidenbach the same day decanting another sample, all tend to suggest that he would not have stopped the practice if he were only issued with a final warning. Accordingly despite his long service I believe dismissal was an appropriate sanction.

Summary of findings

49] The arbitrator committed a number of reviewable irregularities in his evaluation of the evidence, leading him to fail to consider certain evidence or to consider the weight to be attached to it.

50] He also committed misconduct in relation to his duties as an arbitrator to determine a dispute of fact which was highly material to the central findings he had to make.

51] Further, his evaluation of the evidence was influenced by entertaining an impermissible inference which no reasonable arbitrator would have considered.

52] For these reasons the award stands to be reviewed and set aside.

53] In substituting the arbitrator's findings and award, an evaluation of the evidence before the arbitrator leads me to conclude that, on a balance of probabilities the applicant did prove that the third respondent decanted a sample and committed serious misconduct by doing so because of the implications of inaccurate sampling.

54] Consequently, I cannot find that the third respondent's dismissal was unfair.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 25 October 2011

Date of judgment: 3 November 2011

Reasons filed : 10 November 2011

Applicant's representative: W P Bekker instructed by Van Zyl Le Roux Inc.

Third Respondent's representative: P Motaung of Nomali Tshabala

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