

**REPUBLIC OF SOUTH AFRICA****THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****JUDGMENT**

Not reportable

Case No: JR 2401/06

: JR 2599/06

In the matter between:

NORTHAM PLATINUM LTD**Applicant**

and

COMMISSION FOR CONCILIATION**MEDIATION AND ARBITRATION****First Respondent****L BORMAN N.O****Second Respondent****NATIONAL UNION OF MINeworkERS obo****KHUMELENI AND ANOTHER****Third Respondent****Head: 02 December 2011****Delivered: 17 January 2012**

Summary: Two review applications. The one review relates to the merits of the arbitration award and the other to the relief granted.

JUDGMENT

MOLAHLEHI J

[1] This matter involves two review applications. In the first application, the applicant being Northam Platinum Limited (the applicant) seeks to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number LP6164-04 dated 10 August 2006. In that case, the applicant seeks to review the decision of the Commission ordering that the fourth respondents be reinstated in their respective employ. The second review, the National Union of Mine Workers (second applicant) on behalf of Mr Khumeleni and Mr Poswa (the employees) seeks to review the same arbitration award on the limited grounds related to the relief granted to the employees. In that review, the applicant seeks to review the decision of the Commissioner for not reinstating the employees after making a finding of not guilty of the offences they were charged with. The first applicant has also applied for condonation for the late filing of its review application. Without over burdening this judgment with the details about late filing of the review, I see no reason why condonation should not be granted.

Grounds for review

[2] The applicant contends in its grounds for review in the first review application that the arbitration award is reviewable because the Commissioner exceeded his powers, failed to apply his mind to the facts on the evidence before him, acted grossly unreasonable and unjustifiably in arriving at the decision as he did.

[3] In the second application, the applicants (respondents in this matter) contend's that the arbitration is reviewable because the Commissioner failed to order reinstatement after finding that the employees were not guilty of the offences they were charged with.

The background facts

[4] The background facts in this matter are fairly common cause and are fully set out in the Commissioner's arbitration award. I therefore do not intend to repeat them in any details in this judgment. Mr Nkhumeleni and Phoswa were prior to their dismissals employed by the first applicant as special team leader development and stopping specialist respectively. They were both charged and dismissed for assaulting a senior manager and insubordination.

[5] It was alleged that on the day in question the two employees assaulted their senior by grabbing, pushing and pulling him around.

[6] The version of the first applicant is that on the day in question, Mr Badenhorst, who is alleged to have been the victim of the assault went with other people to investigate a fire at a number of places at the workplace. After investigating the first area, they proceeded to the second area. In order to access the second area, they had to pass the control gate in order to enter the shaft area. It is at this point that the two employees are alleged to have pulled and pushed Mr Badenhorst.

[7] The employees in their defence say that they did not assault Mr Badenhorst but on the day in question, Mr Badenhorst together with those he was with sought to access the shaft as a group in contravention of the rule which the employees had adopted on their own to deal with people accessing the shaft areas in the absence of the cage. The rule also provided that only one person would be allowed to go through the control gate at a time. The employees say that the rule was introduced as part of managing and ensuring safety as there had previously been injuries and deaths when more than one person went into the cage. They also say others have accessed the shaft in order to commit suicide.

The Arbitration award

[8] In as far as procedure was concerned, the Commissioner found that a fair procedure was followed in disciplining the employee. As concerning substantive fairness, the Commissioner made the following finding:

'In light of the above, I am convinced that on a balance of probabilities a skirmish took place between Badenhorst and the applicants. This resulted in a pushing and pulling from both sides. I am however of the opinion that this matter could have been resolved at the time if both parties were not so hot headed. The applicants did react in a disrespectful and insubordinate manner and could have avoided the incident. However, Badenhorst could have listened to Nkhumeleni for a moment, he could have avoided the incident. I feel that disciplinary action short of dismissal would have been appropriate as per the respondent's Disciplinary Procedure . . .'

[9] It is on the basis of the above reasoning that the Commissioner ordered that the employees should be reemployed.

Evaluation of the first review

[10] The issue which the Commissioner had to determine in this matter during the arbitration hearing was whether the employees were guilty of assaulting Mr Badenhorst. The question for determination in this judgment is whether the Commissioner performed that duty as would have been expected by the law.

[11] It is trite that Commissioners in conducting arbitration proceedings have certain duties to perform in terms of the law. In performing those duties, the Commissioners have very wide powers to determine the appropriate manner in which the dispute is to be resolved. In terms of section 138 of the LRA :

‘The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with minimum legal formalities.’

[12] The dispute which was before the Commissioner in this matter concerned both the procedural and substantive unfairness of the dismissal of the employees. The Commissioner found that the dismissals of the employees were procedurally fair. This finding was not challenged. The first applicant has challenged the finding as concerning the substantive fairness of the dismissal. The second applicant challenges the finding regarding the relief granted by the Commissioner.

[13] I have earlier indicated that the Commissioner has set out in details the evidence of the various witnesses that testified during the arbitration hearing in the arbitration award. The question is whether that is enough to insulate the arbitration award from interference by the Court? In my judgment that is not enough to satisfy the requirement of ‘dealing with substantial merits.’ as provided for under section 138 of the LRA.

[14] One of the duties of a Commissioner seating as an arbitrator is to find facts and not just to elaborate on the evidence as presented by the parties. In this respect, the Commissioner has a duty to effect the intentions of the legislature by determining the dispute as defined by the parties. In that respect, the Commissioner is required to make a clear, precise and definitive finding as to the issues in question. In the

present instance, the Commissioner was required to determine in a precise and definitive manner as to whether the employees were guilty of assault.

[15] Grogan in Workplace Law (tenth edition) page 216, says assault is an unlawful and intentional application of force to a person, or threat that force will be applied. The definition of assault is wide enough to include touching a person even if such touching does not result in any injury of the affected person. Even the use of force to block the path way of a superior could equal assault and insubordination as it undermines authority of management. Assault on a superior will depend on the circumstances of a given case and can be regarded as serious insubordination. Assault of a superior negates respect of the position of the senior due to the position that he or she occupies and is a manifestation of defiance and undermining of authority.

[16] It is generally accepted that assault is a valid ground for dismissal. However, an employer has to evaluate the circumstances within which the assault is alleged to have taken place before imposing the sanction of dismissal. A defence put forward by an employee accused on assault or an explanation of the circumstances within which the assault took place has to be taken into account in considering the sanction to impose.

[17] In the present instance, it is common cause that the reason for the dismissals of the employees was because of the alleged assault on the manager. The enquiry which the Commissioner had to conduct was whether the assault on the manager did as a matter of fact take place. This enquiry is conducted to determine the validity of the reason for the dismissal. The Commissioner had to determine whether the assault took place by applying the facts before him to the definition of assault. The facts are applied to the definition in the context where the employer bears the onus of proving that the dismissal was for a fair reason.

[18] If those accused of assault are found to be innocent of the alleged assault then that would be the end of the matter, in that the reason for the dismissal would be found to be invalid and therefore the dismissal would be found to be unfair. Once assault is established by applying the facts of the particular matter to the definition of assault, the next inquiry to be conducted by the Commissioner is to determine whether in the circumstances of that case dismissal as a sanction is reasonable or fair. Another important enquiry which the Commissioner has to conduct is that of

determining whether the trust relationship between the employer and the employee accused of assault has broken down.

[19] In *Edcon Ltd v Pillemer NO and Others*,¹ the Labour Appeal Court in dealing with issue of the breakdown in the trust held per Mlambo JA that:

'In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in the execution of her duties as a CCMA arbitrator. The challenge, therefore, to Pillemer's award on this basis is without merit. I have no hesitation in concluding that the award issued by her is properly compliant with the constitutional standard of reasonableness propounded in *Sidumo*. This conclusion on its own is, in my view, dispositive of the appeal. I find it unnecessary therefore, in view of this conclusion, to consider the other interesting point regarding the admissibility of hearsay evidence, raised on behalf of Edcon.'

[20] Turning to the facts of the present matter, it is apparent from the reading of the transcript of the arbitration hearing that the Commissioner was faced with two contradictory versions of both parties. On the one hand, the applicant's version was that Mr Badenhorst was assaulted by the employees by pushing and pulling him when he sought access to the shaft to investigate the possibility of fire. The employees on the other hand denied assaulting Mr Badenhorst and asserted that it was Mr Badenhorst who assaulted one of them when he approached him to advise that the rule adopted by the employees was that no one was allowed into the shaft in the absence of the cage.

[21] It is important to note that Mr Badenhorst did not testify at the arbitration hearing. The Commissioner seems to have accepted the applicant's explanation that he could not testify because he was no longer employed by it. It should however be noted that part of his statement which seem quite critical was read into the record during the arbitration hearing. That statement does shed some light into what happened in as far as Mr Badenhorst was concerned on that day. Whilst the

¹ [2009] JOL 24333 (SCA); [2010] 1 BLLR 1 (SCA) at para 23.

statement of Mr Badenhorst is hearsay evidence, in properly applying the rules of evidence, this evidence could have assisted in shading light into some aspect of this case in particular in relation to the credibility of the evidence of the applicant's witnesses. This piece of evidence would have gone a long way to assist in resolving the conflicting versions.

[22] In the recent unpublished case of *The Director General: Department of Public Works: Limpopo v Sello Jermia Tselane*,² this Court summarised the approach to adopt when dealing with conflicting versions as follows:

'It is trite that when faced with two conflicting versions the enquiry which the arbitrator has to conduct is that which was set out in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Kie SA and Others*. The enquiry essentially entails assessing and making a finding on the credibility of witnesses including the probabilities to determine where the truth lies in the matter. It would seem to me that the key aspect of this inquiry is whether the probabilities favour the party that bears the onus of proof. It is also important to note that whilst the credibility of a witness is in an extricable manner bound to the consideration of the probabilities of the case, the arbitrator should resort to credibility where the probabilities fails to point which version embraces the truth.'

[23] In my view, there is some doubt about the credibility of the witnesses of the applicant which, had the Commissioner applied his mind to the task at hand he would have found that the applicant had failed to show that the dismissals of the employees were for a fair reason. I will however not venture into making a definitive finding regarding the credibility of witnesses as it is generally accepted that the issue of determining credibility is the competency of the trier of fact and not the court seating on review.

[24] It should however be pointed out that it is hard to believe the versions of Mr Mienaar and Mr Qoali. Mr Mienaar was at the time of the incident a senior security officer. He testified that he stood by and watched as his colleague was being assaulted. He says he could not intervene as the 'pulling and pushing' was going on because he was afraid that other employees would join in the alleged fray. He

² case number JR 948/09 at para See *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Kie and Others* 2003 (1) SA 11 (SCA) and *Westonaria Local Municipality v SALGBC and Others* [2010] 3 BLLR 342(LC).

appears to have been a biased witness who sought to exaggerate what transpired on the day in question. In his statement which was used during the disciplinary hearing, Mr Badenhorst said that one of the employees grabbed and as he pulled him away he hit an object which injured him.

[25] The same applies to Mr Qoali who at the time of the incident was a team leader. He also stood as a spectator during the assault of his colleague. According to him, the assault took place over a period of about five to six minutes. The picture that he projected in the same way as Mr Mienaar is that of total chaos, frightening and everything being out of control. However, they did nothing even seeking assistance.

[26] The testimony of Mr Bear was also not helpful to the case of the applicant when properly analysed. He testified that he did not know the employees and could not identify them with their faces but remembered that one had a bigger body than the other.

[27] Beside the issue of resolving the conflicting versions, the two tasks which the Commissioner ought to have applied his mind to but failed to do so were; whether there was a breakdown in the relationship between the parties as a result of the alleged offence and whether the sanction imposed by the applicant was fair in the circumstances of this case.

[28] There is no indication in the record of this matter, that the applicant led evidence to show that the relationship between the parties had broken down as a result of the incident in question. It was argued on behalf of the applicant during the hearing of this matter that it should be inferred that there was a breakdown in the relationship. In my view, there is no basis on the facts and the circumstances of this case to warrant such an inference.

[29] Turning to the issue of the fairness of the sanction, I am of the view that had the Commissioner applied his mind to the facts he would have come to the conclusion that the sanction imposed was in the circumstances of this case too harsh. In the first instance, the version that the employees did not know Mr Badenhorst and his position as a manager was not challenged by the applicant. Assuming that it was to be found that they assaulted Mr Badenhorst as was alleged, then in the facts as they stood they could not be guilty of undermining the authority

of their senior. The uncontested evidence is there they did not know who he was and those who have assisted in the situation stood by and did nothing. They could therefore not have had the intention to undermine his authority in the absence of knowledge of his position.

Conclusion

[30] In my view, the precise findings which the Commissioner ought to have made are whether the employees were guilty of assault and also whether they had the intention to undermine activity of the manager. The failure to make that clear pronouncement renders the award of the Commissioner reviewable. Although I do not make any determination as to the credibility of the witnesses as an aspect of resolving the conflicting versions which would have necessitated remitting the matter back the CCMA, I do not intend remitting the matter back for two reasons which are very apparent from the record. The reasons are as indicated above the harshness of the sanction and failure by the applicant to prove that the relationship of trust has broken down as a result of the alleged assault.

[31] In light of the above, the arbitration award of the Commissioner stands to be reviewed set aside and substituted with an award that the dismissals of the employees were unfair and the relief should be reinstatement. There is no evidence that the reinstatement would be an inappropriate relief.

[32] It goes without saying that the second review stands to succeed. I do not however believe that costs should be awarded to any of the parties.

Order

[33] In the premises, the following order is made:

1. The arbitration award issued by the second respondent is reviewed and set aside.
2. The arbitration award of the second respondent is substituted with the award that reads as follows:
 - (a) The dismissals of the applicants were unfair.

- (b) The respondent is ordered to reinstate the applicants in their employ retrospective to the date of their dismissal without loss of any benefit.
3. There is no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv G Scheepers instructed by Van Zyl Le Roux
Attorneys

FOR THE RESPONDENT: Mr P Motaung of Nomali Tshabalala Attorneys