



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR207/12

In the matter between:

MARULA PLATINUM (PTY) LIMITED

Applicant

and

LOMBARD OCKERT

First Respondent

SOLIDARITY

Second Respondent

MELLO MOHLOMELELE CHRISTOPHER N.O.

Third Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Fourth Respondent

Heard: 17 January 2013

Delivered: 23 May 2013

**Summary: Review application – company did not discharge its onus –
decision based on the facts**

JUDGMENT

GAIBIE, AJ

Introduction

- [1] This is an application to review and set aside the arbitration award (“the award”) issued by the third respondent (“the commissioner”) under case number MP8879-10 dated 18 December 2011.
- [2] The issue in this matter turns essentially on whether the applicant (“the company”) had discharged its onus in establishing that the first respondent, Mr Ockert Lombard, was guilty of the following charge:

‘Gross dishonesty in that you concealed an accident of Mr Mokome of Industry No C0827964 – date of alleged offence – 23 September 2010’.

- [3] The company seeks to review the arbitration award on five grounds, at least three of which attack specific findings made by the arbitrator and are articulated as process related grounds of review¹. In relation to the last two grounds of review, the company attacks the award on more general grounds, that relating to the probabilities of the matter and the consideration of irrelevant evidence in the determination of the matter. As indicated in the preceding paragraph, and despite the company’s articulation of the various grounds of review, the central issue in this matter is whether the arbitrator’s determination - that Lombard’s dismissal was substantively unfair - was a decision that would have been reached by a reasonable decision maker in terms of the principle enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.²

Background facts

- [4] Lombard was employed by the company as a mine overseer on 1 December 2009. On 29 November 2010 he was dismissed on the basis of the above charge.
- [5] The allegations in respect of this incident involve the following:

¹ As articulated by Van Niekerk J in *Pam Golding Properties (Pty) Ltd v Erasmus and Others* (2010) 31 ILJ 1460 (LC) at para 6. Reviews on the basis of process related grounds has also received ratification in several other judgments of the Labour Court and the Labour Appeal Court

² 2008 (2) SA 24 (CC) at para 110.

- 5.1 Mr Rexion Mantope Mokome ("Mokome"), an employee and rock driller, alleged that he had been injured whilst on duty. According to him a rock fell on and injured his left ankle.
- 5.2 Mokome requested a co-employee, Mr Lehlabapuda Gabriel Moropa ("Moropa"), to call his immediate supervisor, Mr Molaka Lucas Molabe ("Molabe") so that he could report the incident.
- 5.3 Molabe was not called as a witness in the arbitration proceedings, but it is not disputed that Molabe issued a note to Mokome which effectively released him from his duties that day. Molabe's statement which formed part of the record before the arbitration proceedings, records the following:

'Mr Makome told me that he could continue working and I also recorded that in my notebook...

...after a few minutes... Mokome informed me that the pain is unbearable and I then gave him a note to go to the clinic.'

- 5.4 The company, like any other entity in the mining industry, had established procedures for the reporting of injuries at the mine. It was not disputed by Mokome that it would have been Molabe's duty, in the first instance, to report the injury in terms of the following process that was outlined by Lombard in his evidence:

5.4.1 The immediate supervisor must fill in a provisional accident report in triplicate in the relevant book. The blue slip which is the original form must, once it is completed, be removed from the book and must accompany the injured to the medical clinic where it must be handed to the clinic staff;

5.4.2 The pink slip must also be removed from the book and submitted to the foreman or mine overseer of the injured person, because he is the direct supervisor or shift supervisor; and

5.4.3 The final slip must be retained in the book.

5.4.4 It is the responsibility of the injured employee's direct supervisor, in this case Molabe, to complete the provisional accident report. The injury should also have been reported to the medical station before the end of shift otherwise it would not be seen as an on-duty injury.

5.5 For some inexplicable reason, Molabe did not comply with this process, and Mokome did not proffer any explanation for such an omission.

[6] Subsequent to Molabe's involvement in this matter and his departure from the scene of the incident, the involvement, if any, of Mokome's shift supervisor, Mr Amos Nkambule ("Nkambule") and Lombard becomes relevant. The evidence in respect of this part of the chronology is however riddled with contradictions.

6.1 At some stage after Molabe's departure, Nkambule and another mine overseer, Mr Frikkie Oberholzer (referred to as "Bullet" in the arbitration proceedings) arrived at the scene to examine the mine's blasting cables, a reason unrelated to the injury sustained by Mokome.

Mokome on the interaction with Nkambule

6.2 According to Mokome, Nkambule had informed him to continue performing his duties despite his injury. Mokome does not indicate whether he informed Nkambule about the precise nature, extent or indeed the cause of his injury. Referring to Nkambule, Mokome said in the arbitration proceedings: '.... he told me to continue drilling and I told him that I am injured and I cannot proceed'.

6.3 Mokome proffers a different recollection of this event in his statement which formed part of the bundle. In the statement he indicates that the instruction (to continue with his drilling duties) was not only from Nkambule but was also from Bullet. In this regard he says –

'... I informed them that I sustained an injury, but both my shift boss and Bullet insisted that I must continue drilling and further indicated I must not leave before the job is done.'

- 6.4 According to Mokome's account of the chronology of events, Lombard was not present during this interaction.

Moropa on the interaction with Nkambule

- 6.5 Moropa, the only other witness for the company, provided a different and contradictory account of the interaction with Nkambule and Lombard. Unlike Mokome he suggested that there was only one interaction between Mokome and his superiors, in which he placed Nkambule, Bullet and Lombard all together. He also suggested that the interaction with Nkambule, on his own, occurred much later. In the arbitration proceedings he said –

'We came across them and they were in or at the motor vehicle, they called us. We went nearer to them, and they then spoke to this gentleman Mr Mokome. I was near.'

- 6.6 Moropa also suggested, unlike Mokome, that the instruction to continue his duties, despite his injury, came from all three of them. In addition he indicated that Lombard threatened Mokome with dismissal, in the event that he refused to comply with their instruction. According to Moropa, Lombard said –

'If you do not go back to work I will fire you.....'

- 6.7 In his statement, Moropa's account of this interaction is more sedate and he makes no mention of any threat of dismissal. He also does not indicate that there was a vehicle, nor does he say exactly where the three men were positioned at the time of this interaction.

- 6.8 His evidence in respect of where the three men were in relation to the vehicle was unsatisfactory. First he insisted that all three of them were inside the car. After it was put to him that his version was not possible given that it was a single cab, he stated that some of them were in the front and some in the back of the vehicle. Pressed for specificity as to who was in the front and the back of the vehicle, he said that Nkambule was in the back and the other two men were in the front. At this stage, Moropa was at pains to suggest that the discussion between Mokome and Nkambula was heard by Lombard (who was in the front of the car),

because his version was, until this stage, that all three men were together, and that all three men issued Mokome with the instruction to continue his drilling duties failing which he would face dismissal, a threat from Lombard.

6.9 For all of the above reasons, Moropa's evidence was unsatisfactory, contradictory and simply unreliable.

[7] After this interaction, Mokome recalls that the three men left the scene of the incident. Thereafter he told Moropa to take him to the waiting place, and it was at this stage of the chronology that Mokome says he interacted with Lombard only.

7.1 According to Mokome, he told Lombard that he was injured and –

'... he indicated that if we do not go and finish our duty he is going to charge us and dismiss us. From there I went down there with Mr Moropa and continued working under those conditions'.

7.2 This interaction, according to Mokome, occurred outside the waiting room when Lombard was sitting in a van. Lombard was with other people but he could not remember who they were.

7.3 Under re-examination, Mokome's account of this interaction appears in more dramatic and exaggerated form. He said –

'Yes, I did report to him and he chased me away and told me to go and complete my job otherwise he will dismiss me'.

7.4 In his statement, which is contradictory to his evidence in the arbitration proceedings, Mokome does not indicate that Lombard threatened him with dismissal.

The instruction, if any, to conceal the cause of the injury

[8] Moropa does not indicate in his evidence during the arbitration proceedings, or in his statement, that there was an instruction from either Nkambule or Lombard to conceal the injury generally or to conceal that information from the mine clinic specifically.

- [9] Mokome's evidence in respect of this issue in the arbitration proceedings, is clear in relation to Nkambule but unsatisfactory, contradictory and incomplete in relation to Lombard.

9.1 In his statement, Mokome records the following in relation to Nkambule:

'My shift boss transported us to the surface by bakkie. On the way Mr Amos influenced me not to report the incident to the clinic. Mr Amos further indicated that if the incident could be reported to the clinic, their production would be badly affected. Mr Amos stressed the fact that I must claim that the incident happened at home, not at the mine so in order to protect them and to save production.'

9.2 Mokome does not formulate this discussion into an instruction, and at best suggests that he had been successfully influenced not to report his injury. Mokome does not explain how his non-reporting would have 'protected' them or 'saved production'. In the arbitration proceedings, Mokome formulated the discussion in more assertive fashion with a different rationale. In this regard he indicated that Nkambule told him that he must not report the matter 'because we are going to lose our bonuses so I must just tell them that I got injured at home.' Mokome does not, in his statement or in the arbitration proceedings, suggest that his non-agreement, if any, to Nkambule's request or instruction was coupled with any threat of dismissal or indeed any other disciplinary action.

9.3 Mokome does not, in his statement, make any such assertion in relation to Lombard. His evidence about Lombard, in the arbitration proceedings, was precipitated by the commissioner during his evidence in chief. His evidence was as follows:

MR BOIKANYO: MR MOKOME did you at any stage tell the clinic that you were injured at home?

MR MOKOME: Yes, I told them as I was afraid that I was going to be dismissed.

MR COMMISSIONER: You mean the mine clinic?

MR MOKOME: Oh, they said if I go to the mine clinic they will dismiss me.

MR COMMISSIONER: Who said you must tell the clinic that you were injured at home?

MR MOKOME: MR LOMBARD and MR NKAMBULE told me that I must not say that I got injured at work, I must tell them that I got injured at home.

9.4 Mokome's evidence about such an instruction, if any, from Lombard sits uncomfortably in the context of the analysis of the evidence presented by the company for three reasons:

9.4.1 Mokome's account of his interaction with Lombard was limited to the allegation that Lombard had instructed him to continue with his drilling duties, and it was that instruction that was coupled with the threat of dismissal.

9.4.2 To the extent that Mokome suggested, in his answers to the commissioner's questions, that Lombard also gave him the instruction to conceal his injury from the mine clinic, he does not locate that evidence chronologically nor does he provide a rationale or motive for such an instruction.

9.4.3 This evidence was, in any event, not corroborated by Moropa.

The Arbitration Award

[10] Based only on a holistic approach to the evidence presented, the company simply did not discharge its evidentiary onus against Lombard. The company's contention that Lombard was guilty of dishonesty because he allegedly concealed the injury sits uncomfortably in the context of the following facts:

- 10.1 In terms of the established procedure for reporting such incidents, the formal process of notification to the company should have commenced with Molabe and not Mokome. No explanation was provided by the company as to why Molabe did not do so. If he had done so, the company would have received prompt notification of the injury;
- 10.2 Mokome's evidence lacks specificity about a number of crucial events, including, but not limited to the following:
 - 10.2.1 The difference in his testimony at arbitration, and that contained in his statement as to whether such an instruction, if any, was given to him by Lombard;
 - 10.2.2 The lack of details as to precisely where, when and in what context such an instruction was given;
 - 10.2.3 The lack of details as to how such an instruction would have affected or benefitted the company, or for that matter Lombard. Alternatively, Lombard's motive, if any, for such an instruction;
 - 10.2.4 On what basis he concluded that he would be dismissed if he did not comply with the instruction;
 - 10.2.5 Why Molabe did not report the incident to the company.

[11] In the absence of all of this relevant evidence, Mokome's evidence that Lombard instructed him not to report the injury or the incident, is more than improbable, and the arbitrator's finding that he was reluctant to accept Mokome's version in respect of this issue, is a decision of a reasonable decision maker.

Order

[12] In the premises, I make the following order:

- (a) The review application is dismissed with costs.

Gaibie, AJ

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Edward Nathan Sonnenberg s

For the Respondent: SOLIDARITY