REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 746/07

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
M.A. MALEPE	**Second Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION,	
AND ARBITRATION	**First Respondent**
NYOFFU L N.O.	**Second Respondent**
ANGLO PLATINUM MINE	**Third Respondent**

Heard: 06 June 2013

Delivered: 12 June 2013

Summary:

JUDGMENT

BENJAMIN, AJ

Introduction

[1] This is a judgment in a review application in respect of an arbitration award by the second respondent. The arbitration hearing was conducted on 10 January 2007 and the arbitrator's award was provided to the party during February 2007. The review was argued in Court on 6 June 2013.06.08

[2] The second applicant had been employed by the respondent mine for a period of 4 years before he was charged with clocking fraud committed on 15 November 2006. For several days before then, there had been irregularities in the manner in which the second applicant had clocked in. The employer alleged that on 15 November, he clocked in on the surface but did report for duty. The second respondent's version was that he had reported for duty at the Human Resources Department where he had been working in a trainee position.

[3] At the arbitration hearing, the employer presented evidence from the human resources co-ordinator, the acting employment relations officer and the relevant section manager at the mine. The second applicant gave evidence in his own defence. In the arbitration award, the arbitrator summarised the evidence and recorded the fact that the applicant stated that he failed to report for duty underground because he needed to consult his trade union representative and needed to undergo a refresher course. She also recorded that the applicant had acknowledged that he was requested by two of his seniors to clock in underground. The arbitrator concluded that the applicant employee had disobeyed a direct and clear instruction by two of his superiors regarding clocking. She also concluded that when the second applicant clocked in on 15 November his intention was not to resolve his problems and that had he not been directed to leave the area by a supervisor he would have been remunerated by the employer for clocking in. The arbitrator therefore concluded that the employee had committed clocking fraud.

[4] In the review the respondent challenges this finding on the basis that the charge of clocking fraud was not the correct ground for him to have been charged with and he should have been charged with failing to follow an

instruction to report for duty. In my view this challenge is not a ground for review and is an issue that should appropriately have been raised in the disciplinary hearing and the arbitration. It is not a ground for setting aside the arbitrator's decision. There is no discernible irrationality in the arbitrator's evaluation of the evidence and in her conclusion that the employee was guilty of clocking fraud and that aspect of the award cannot be aside.

[5] Having concluded that the employee was guilty of clocking fraud, the arbitrator proceeds directly to accept that the employer's sanction of dismissal was fair in the circumstances. However, the award unfortunately does not reflect the reasoning for reaching this conclusion. This omission would appear to amount to a *"process error"* in the sense contemplated in the *Herholdt v Nedbank* Ltd [1]. The Applicant suggested that this provided a basis for the Court to review the matter because the Arbitrator did not onsider alternatives to the sanction of dismissal. The Applicant argued that I should either substitute my own finding or refer the matter back to the Arbitrator to reconsider the issue. Certainly, a referral back to the CCMA would be totally appropriate in the current circumstances both because of the lengthy period since arbitration and because adopting such an approach regularly would serve to overburden the CCMA.

[6] There are a number of indications on the record that the Arbitrator's conclusion that the sanction of dismissal was fair is not unreasonable. These include uncontested evidence that the employer's Disciplinary Code provides for dismissal for clocking fraud as a first offence, that this penalty had been consistently applied and that some 17 employees had been dismissed by the employer for clocking fraud. Accordingly, I am satisfied that the decision to confirm the employer's sanction was one that could have been made by a reasonable decision-maker and, accordingly, there is no basis for setting it aside in review proceedings.

[7] The applicant further challenged the procedural fairness of the dismissal. The Arbitrator upheld this claim in part finding that a failure by the employer mine to notify the trade union that it was taking disciplinary action against the

[1] (2012) 33 ILJ 1789 (LAC)`

second applicant, who was an alternate shop steward, was procedurally unfair because it did not comply with the Code of Good Practice: Unfair Dismissal. The Arbitrator awarded one month's compensation. While the award of compensation may be low, again I do not feel that the Arbitrator's decision falls within the ambit of a reviewable irregularity.

[8] Accordingly, the application for review of the arbitration award by the second respondent is dismissed with costs.

Benjamin, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: T. Faku

Instructed by Nomali Tshabalala Attorneys.

For the Third respondent: B. Shezi

Instructed by Edward Nathan Sonnenbergs