IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1607/15

In the matter between

NUM OBO LODIUS SEBABI	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COLLINS LENKWASI MAKAMA *N.O*	**Second Respondent**
MUTUAL CONSTRUCTION COMPANY (PTY) LTD	**Third Respondent**

Heard: **17 May 2017**

Delivered: **17 May 2017**

JUDGMENT

CELE, J:

Introduction:

[1] The application before me is of a bifurcated nature. The first part of it is an application brought in terms of section 145 of the Labour Relations Act[1], (LRA), where the applicant seeks to be granted an order which it

[1] Act 66 of 1995, as amended

framed in the following terms:

> "1. Reviewing and setting aside the arbitration award handed down by the second respondent under case number NWRB892/15 dated 3 July 2015.
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> 2. Substituting the award of the second respondent with an order that the dismissal of Mr Sebabi was substantively unfair and reinstating him in the third respondent's employ.
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> 3. Alternatively to the order sought in paragraph 2 above, an order referring the matter back to the first respondent for arbitration *de novo* before a commissioner other than the second respondent.
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> 4. Directing the respondent opposing the relief sought herein to pay the costs of the application.
>
> 5. Granting the applicant further an alternate relief."

[2] The application was indeed opposed by the third respondent in his capacity as the employer of the employee, Mr Sebabi, who is a member of the applicant, the National Union of Mineworkers (NUM).

[3] The second leg of the application is an application for condonation for the late filing of the review application in this matter. The lateness is a period of just seven days. To this extent, Mr Sebabi testified under oath, because there were no supporting documents for this application whilst a promise was made in the founding papers that such an application would be filed.

[4] Mr Sebabi testified; and if I may begin with that part of the application. He indicated that he resides in Limpopo. He was telephoned by an official of the NUM, who informed him that there were documents that he needed to sign meaning to have those documents commissioned and he was to travel to Rustenburg where this was to be done.

[5] He did not have the money at the time. He requested his union to assist him with such transport money. It took them about five to six

days when that money was then deposited through a cardless transaction *via* the Shoprite store where a pin code was given to him. Because he had to travel to Shoprite, he was delayed. It took him about two to three days to get there, because he did not have the money to go to Shoprite at his area. At some stage, he was able to go to Shoprite and was able to withdraw the amount of money. He then travelled to Rustenburg where he then took part in the commissioning of the founding affidavit, which constitutes the initial steps of the review application.

[6] At the commencement of these proceedings, I asked Mr Posthuma, appearing for the third respondent, certain questions that talk to how the commissioner conducted an enquiry into the evidential material that was before the commissioner. Certain concessions relating to the weekend period were made by him, but I will refer to this shortly. In summary then I have to go back and revisit the evidence.

<u>Background</u>

[7] The employer (Mutual Construction Company (Pty) Ltd) conducts operations in the mining industry and had an open cast mining near Rustenburg, North West Province. The employee concerned in this matter commenced employment with the employer on 9 January 2012 as a RDT operator. He was driving what is called a dump truck. To drive it, he had to possess what is called a pit licence. That pit licence would periodically expire and had to be renewed. In order to renew it, he had to undergo a prescribed training course after which the licence could thereafter be renewed.

[8] In this instance on 30 September 2014, the employee's pit licence expired. He then had to undergo the prescribed course at the workplace. There is a location where these courses are run. A person by the name of Lerato was responsible for facilitating these courses. The procedure being that an employee presents him or herself at the premises of the company is given a route form that tracks his

movement. Once that route form is given, he is then directed to the class where the lecture is conducted. The lecture is conducted there and whoever is responsible for administering the lecture will ensure that the attendees sign an attendance register.

[9] At some stage during the day the attendees have to sign a timesheet. This timesheet is used by the company to pay the attendees, as they are deemed to be on duty. They would have attended the course. They would be entitled to salary payment. So, the timesheet generates the system through which salary payment is made.

[10] The employee attended these sessions, but it came to light that he would not attend any sessions during the weekends. In particular on 4 and 5 October 2014 and 11 and 12 October 2014. On these dates he presented himself and therefore would have signed the attendance register for coming in, but he could not go to the lecture hall, because there are no such courses that are offered during the weekend.

[11] There are other dates where he did not attend but signed the register. There are also occasions where the attendance register was not signed. This includes 2 and 3 October and 6 and 12 October where the attendance register was not signed. He, however, would have then completed the timesheet.

[12] The company decided to charge him with an act of misconduct, believing that when he was supposed to be attending a training course, there are days where he did not present himself and yet the timesheet he presented suggested that he did attend. He was found guilty of these acts of misconduct and he was then dismissed.

[13] He was aggrieved by the dismissal. He referred an unfair dismissal dispute for conciliation. Conciliation failed to resolve it and he referred the dispute to arbitration. The second respondent was appointed to arbitrate this dispute. The dismissal was common cause and therefore the employer had to first lead its evidence through its witnesses to prove the fairness of dismissal.

[14] In this case the employee had been facing a charge of fraud. The evidence was led through Mr Esrom Mojalefe for the company. And then the evidence of Mr Pieter Johan is Pauli who also testified.

[15] At the end of those proceedings (that is the arbitration hearing) the second respondent issued the assailed arbitration award with the finding that the dismissal of the applicant was substantively fair and the matter was dismissed. The union acting on behalf of its member initiated the presented application (this is the review application), challenging the findings of the commissioner.

<u>Condonation application:</u>

[16] I then revert to the condonation application. The period of delay is about seven days. It is a fairly short period of time. And the explanation has been proffered by the employee. The explanation is acceptable. It stands unchallenged. In fact, Mr Posthuma has indicated that the condonation application is not opposed. Rightfully so, because there is merit in this condonation application in the sense that the explanation is plausible when the period is fairly short; and by the time Mr Sebabi testified, we had deliberated on the merits of the review application.

[17] There are very good prospects of success in this application. And the condonation application is heard simultaneously with the review application. There will therefore be no prejudice suffered by any of the parties. It is therefore in the interest of justice that condonation should be and is therefore granted.

<u>Evaluation:</u>

[18] I revert to the review application. The test for a review application is set in the well-known decision in *Sidumo and Another v Rustenburg Platinum Mines*[2]. The test is stated in simple terms, being whether or not the decision reached by the commissioner is one that a reasonable decision-maker could not reach.

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[2] (2007) 28 ILJ 2405 (CC)

[19] That decision has been subjected to a number of interpretations and application, including the *Herholdt v Nedbank Ltd*[3] decision at paragraph 25 where more is said to this effect. In summary, the position regarding the review of CCMA awards is this:

> "A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result would only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as weight and relevance to be attached to particular facts are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[20] Another guide comes from the well-known decision in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mining) v CCMA and Others*[4]. It is a judgment of Waglay JP. He deals with the review test from paragraph 13 to paragraph 21 of the judgment. I will not read these paragraphs, but I will pay particular attention to what is said in paragraphs 19 and 20. Those are the guides and this is in harmony with what is said in the *Herholdt* decision.

[21] In summary, the question is simply whether the commissioner conducted a proper inquiry into the evidential material before him or her and that if he had done so, issued an award that is reasonable in the circumstances when all the evidential material is considered.

[22] This then takes me back to the days when Mr Sebabi came to work on weekends, in particular 4 and 5 October 2014 and 11 and 12 October 2014. His evidence was that he came to work, because there was no course during the weekend. He could not present himself

[3] [2013] 11 BLLR 1074 (SCA)
[4] (2014) 35 ILJ 943 (LAC)

to the lecture room. The commissioner did not at all deal with these dates. There are four dates and they are therefore significant. He should have said something in the award. The award is very much silent about that.

[23] There is further evidence of the employee that he had attended certain other courses, but they had been repeated on some days. He felt it was unnecessary therefore to again present himself there, because he had already attended those sessions. He then says because he had attended enough training sessions, he subsequently was given the licence or it was renewed to him. The renewal was a significance or an indication that he had attended enough for the pit licence to be issued to him.

[24] Again, the commissioner did not look at this evidence that I am referring to. All that the commissioner said were basically the following, and I read paragraphs 18 and 19.

> "18. Having heard the evidence of both parties, I have observed that the applicant did not sign the attendance register for the following dates: 2, 3, 6, 7, 8, 9, 10, 11 and 12 October 2014. These are the dates upon which various training sessions took place. Apparently, the applicant should have attended those training sessions. Alternatively, if he was not attending those sessions, then he must have been at work. In simple terms, he is either at work or training. If he is not at work or at the training, then acceptable will be for him or any person to not to claim for those days. There is no basis for any person to claim or complete a timesheet for the days that a person was not at work.
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> 19. Having listened to the evidence by both parties and consideration of the documents submitted, I have observed that the applicant signed a timesheet, claiming the days of 4 October, 5 October, 6 October, 11 October and 12 October. I cannot understand if the applicant did not sign the attendance register on those days how he justifies his attendance for those days. What could be the proof that shows that he had worked or was at training on those days? In all fairness he does not have any. My understanding of an attendance register is to record

and to account for someone's attendance. If the applicant did not sign the attendance register, why did he record his attendance? How does he account for his attendance? If there was an issue about the attendance register, why did he complete some on certain days and leave some on other days. Also for him to be able to justify his completion of the training hours, he is going to do so without the attendance register."

[25] Might I read paragraph 22

"If there is nothing from the applicant to show that he had attended the sessions, can it be said that he was present at those sessions? I do not think so, as there is no proof for such. The probability is that the applicant was not in attendance. That being the case, was the absence of the applicant at the training sessions authorised? It does not appear so. Similarly, can the applicant claim for those days in the absence of any proof? It cannot be, because if it was to be allowed, then it would amount to a fraudulent activity as suggested by the respondent."

[26] The commissioner finally accepted the evidence of the employer and rejected the evidence of the employee and issued the award, as I have indicated what I have read indicates that the commissioner missed the actual inquiry he was called upon to determine. I have indicated that the 4th and 5th and the 11th and 12th of October 2014 fell on a weekend and that is common cause. It is also common cause that no courses are run during the weekend. The employee presented himself and therefore his name would appear in the attendance register. He was at work. The commissioner seems to assume that he was not at work. He was not outside of the company premises when the evidence, it was undisputed, indicated that he was at work.

[27] The biggest problem there is about this case is that no evidence is led as to what should happen to an employee such as the present one where he cannot attend a course, because there is no course running

at the time or he has attended a session similar to the course that is running, but present himself at work, hands in the attendance register. What must happen to that person? Normally there would have to be a supervisor who allocates different work other than that of driving, because his licence would have expired and therefore he could not do the normal work that he was to do, but there is an abundance of silence about that as to what was to be done.

[28] The commissioner does not interrogate this piece of evidence. Had he done so, he in all probabilities would have come to a conclusion possibly that the employee might not have committed the misconduct charged, depending on the company policy about his movements once he presents himself. In the absence of that evidence, it also puts me in a difficult position as to honour the request of the applicant in the event I review the award to substitute, because there is a paucity of evidential material in relation to what I have just said.

[29] In my view, the commissioner committed a gross irregularity in how he went about applying his mind into the evidential material. He missed all material evidence that was before him. The consequence is clear. He therefore issued an unreasonable award. That gives me the right to review this award and set it aside. I have intimated to the parties in the presentation of this matter that it is not a matter where I should be substituting because of the paucity of the evidence.

<u>Order:</u>

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

1. The application for condonation of the late filing of the review application is granted;

2. The arbitration award dated 3 July 2015 issued by Commissioner C.L Makama under case number NWRB 892/15 issued under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) is reviewed and set aside;

3. This matter is remitted to the CCMA for a *de novo* arbitration hearing before a Commissioner other than the second respondent.

4. There is no order as to costs.

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H. Cele

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr K.D Maimane of K.D Maimane Incorporated
For the Third Respondent:	Mr A. Posthuma of Snyman Attorneys