



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1069/2015

In the matter between:

MARULA PLATINUM (PROPRIETARY) LIMITED

Applicant

and

AMCU obo PHINEAS MAFOLOGELA

First Respondent

THEMBINKOSI BACA N.O

Second respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

Heard: 31 August 2017

Delivered: 19 September 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] With this application, the applicant (Marula) seeks to have the arbitration award dated 29 April 2015 and issued by the second respondent (Commissioner) acting under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), be reviewed and set aside. AMCU representing Mr Phineas Mafologela opposed the application.
- [2] Mafologela was employed by Marula with effect from 2006. He was dismissed on 5 November 2014 and during that period he occupied the position of Dump

Truck Operator. The dismissal followed upon allegations of misconduct related to failure to adhere to Marula's safety operating procedures. In a nutshell, it is alleged that he had attempted to drive through a group of employees who had gathered at the premises for a safety meeting. Upon the Mine Manager (Mr Msekeza Lumphoko) intervening, and calling Mafologela to apologise to his colleagues for his conduct, it is alleged that he responded by saying '*fuck off*' and threw his hands in an upward and inappropriate motion.

[3] An alleged unfair dismissal dispute having been referred to the CCMA, and upon the failure of conciliation, the dispute came before the Commissioner for arbitration. Two witnesses had testified at those proceedings on behalf of Marula. The evidence of Lumphoko is summarised as follows;

3.1 The incident that led to the dismissal took place in the morning of 23 September 2014 when a safety meeting had been convened on site in an open area. Prior to the commencement of the meeting, Lumphoko had observed an underground dump truck operated by Mafologela coming from underground in reverse mode towards the employees gathered for the safety meeting. At the time, Lumphoko was about to step on the podium getting ready to address the meeting. Mafologela stopped the truck at some point having been told that he was called to the podium where Lumphoko and others were.

3.2 As Mafologela was making his way to the podium, Lumphoko made a comment that people needed to be disciplined for such conduct. When Mafologela arrived at the podium, Lumphoko instructed him to apologise for his conduct to the other employees gathered. In a defiant manner, Mafologela's response to Lumphoko was '*fuck off*', and threw his hands in an outward motion, and left the podium without tendering an apology.

3.3 Lumphoko had then initiated an investigation into the matter, leading to a disciplinary enquiry. Lumphoko further testified that Mafologela was a trained and competent driver, and had he apologised for his conduct as instructed, that would have been the end of the matter. Mafologela had

instead responded by swearing and gesturing, and thus made himself guilty of insubordination.

- 3.4 Lumphoko insisted under cross-examination that Mafologela had refused to apologise, uttered the verbal abuse and gesticulated with his hands as he left.

[4] Marula's Senior Instrumentation Technician, Mr Lazarus Mpofu's testimony was that;

- 4.1 He was on the podium and had finished with opening prayers for the meeting when he had also observed Mafologela coming from underground in reverse gear thus posing a danger to other employees on the open road and those gathered for the meeting. He had shouted at Mafologela in an attempt to have him to stop, further asking other employees close to him to tell him to stop as he could have caused injury to other employees. Mafologela only stopped after the intervention of Lumphoko, who had utilised the loudspeaker system on the podium, and who also told him to come to the podium to explain his conduct.
- 4.2 Mafologela came to the podium as instructed by Lumphoko, and was informed by the former that he needed to be disciplined for his conduct. Mpofu was asked by Lumphoko to take Mafologela's company number and it was at that stage that the latter had uttered the words attributed, simultaneously gesticulating inappropriately with his hands. Mafologela according to Mpofu also told Lumphoko that he could 'do whatever he wanted to do'.
- 4.3 Mpofu had further testified that management was concerned with safety on the premises, and that Mafologela had failed to provide a safe environment hence Lumphoko had seen the need to intervene. Mpofu could not say whether he had heard whether Mafologela was asked by Lumphoko to apologise, but Mafologelo's hand gestures and the words he had uttered showed disrespect to a senior manager.

- [5] A third witness, Mr Edwin Tshiguvho also confirmed that Mafologela was told by Lumphoko over the loudspeaker to stop the truck and to come to the podium to apologise to his fellow employees. Instead he verbally abused Lumphoko as he gestured with his hands, telling him 'to do what he wanted to do'.
- [6] Mafologelo's testimony was that he had just finished his night shift and was operating the truck from underground behind other similar trucks. At some point whilst he was stationary and waiting for pedestrians to pass, he had noticed Lumphoko shouting but could not hear what he was saying. He then realised that he was being called to the podium and on his way, he heard Lumphoko saying that he was going to dismiss him.
- [7] When he reached the podium, Lumphoko asked him what he was taught at the training centre. Before he could respond, he was again told that he was going to be dismissed. He then asked Lumphoko as he was gesturing with his hands in disbelief, what he had done wrong. Lumphoko then asked for his company number which he had given and he then left the podium. The following day he reported at the premises but was prevented from resuming his duties.
- [8] Mafologela denied having been asked to apologise or having verbally abused Lumphoko. He further denied having used inappropriate hand gestures as he spoke to him and testified that he normally used hand gestures when speaking to people, and it was not intended to show disrespect. He denied that he was aware that a safety meeting was in progress in the open area and contended that he had stopped on his own when he was subsequently asked to come to the podium. He had further denied that his conduct placed anyone's life in danger as he had complied with all the rules applicable when operating the truck.
- [9] Mr Wilkins Phoku's testimony on behalf of Mafologela was that he was a safety representative and a week prior to the incident, a meeting had been held with management where concerns were raised regarding the convening of meetings in an open area where machinery was moving back and forth. He was close to the podium when he noticed Mafologela operating the truck and being called to the podium. He overheard Lumphoko (speaking in isiZulu)

saying that Mafologela should be called to the podium and be dismissed. When Mafologela arrived at the podium, Lumphoko asked him what he had been taught at the training centre, and told him that he was dismissed. Mafologela during his conversation with Lumphoko was gesturing with his hands. Lumphoko had then demanded Mafologela's company number which he had duly given and left.

The award:

[10] The Commissioner came to the conclusion that Marula had not discharged the onus of proving that the dismissal of Mafologela was for a fair reason, and had ordered that he be reinstated with retrospective effect, and be paid an amount of R77 803.84 in back-pay. The Commissioner's reasoning was as follows;

10.1 Mpfu's recollection of events was not convincing and were 'akin to trumped-up defence intended at justifying the decision' that was taken against Mafologela. This was due to the fact that despite Mpfu having stated that he was within earshot of the podium and had heard the abusive language uttered without provocation, he had denied having heard Lumphoko asking Mafologela to apologise to the other employees;

10.2 Mafologela according to the Commissioner was 'level-headed and would hardly insult or offend anyone including superiors, without provocation', and was not asked to apologise as testified by Lumphoko and Tshiguvho;

10.3 Mpfu and Tshiguvho were found to be evasive witnesses in regard to whether driving a truck in reverse was prohibited on the mine;

10.4 Mafologela and Phoko's version that Lumphoko had told the former that he would be dismissed, caused him to be surprised hence he had gestured in disbelief and frustration at what he was being told. Had Mafologela shown his 'superiors his middle finger' then a dismissal would have been confirmed. The gesture in question was purely a physical reaction to someone who was surprised, and did not constitute

insolent behaviour. The inability of Marula's witnesses to corroborate each other's version regarding what Mafologela had said to Luphuko indicated that Marula was unable to prove that there was verbal abuse;

- 10.5 It was improbable that Mafologela could have verbally abused Luphuko. None of the employees whose lives were allegedly put at risk by Mafologela had testified in the proceedings. Mafologela had observed the rules of the mine whilst operating the truck, had not placed anyone's life in danger, and he did not break any rule when he operated the truck in reverse gear.

The grounds of review:

- [11] Marula seeks to have the award reviewed and set aside on various grounds, including that;
- 11.1 The Commissioner committed a gross misconduct and/or reviewable irregularity in the conduct of proceedings in making a credibility finding against Mpofu and thereby concluding that the version of Mafologela was more probable;
- 11.2 The conclusion reached as above was not rationally justifiable and was one which no reasonable decision maker could have reached;
- 11.3 The Commissioner committed a gross misconduct and/or reviewable irregularity in the conduct of the arbitration proceedings, in failing to make a credibility finding against Mafologela and his witness, Phoku;
- [12] In opposing the review application, it was submitted on behalf of Mafologela that there was no basis for the arbitration award to be set aside as the Commissioner understood the test to be applied in determining the matter; that the Commissioner had the power to make credibility and reliability findings as he had done in this case, and had therefore not committed any misconduct or irregularity. It was further submitted that the decision of the Commissioner was supported by evidence, and was one that any commissioner could have reached.

The legal framework and evaluation:

- [13] To the extent that the grounds of review essentially revolves around allegations of gross irregularity committed by the Commissioner in the conduct of proceedings, it has since been held in *Herholdt* that;

‘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 s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) ...the Arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will 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, 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.’¹

- [14] It cannot be doubted in this case that the Commissioner was confronted with disputed facts. In such instances, and in accordance with the CCMA Guidelines on Misconduct Arbitrations, a Commissioner is obliged, to have regard to the probabilities of the contending versions, the reliability of witnesses, and their credibility. It is thus required of a Commissioner to indicate the reasons, based on the assessment of these factors and the

¹ *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] 11 BLLR 1074 (SCA) at para 25; See also *Belloord 28 CC v CCMA Johannesburg and Another* (JR1499/17) [2018] ZALCJHB 112 (15 March 2018) at paragraphs [10] – [11], where Van Niekerk J held that:

“What this analysis requires is that the review court determine first whether the arbitrator perpetrated any ‘defect’ or irregularity contemplated by s 145 (2). Secondly, the court must have regard to the distorting effect that the error may have had on the outcome of the arbitrator’s award. Thirdly, if it is reasonably clear that but for the identified error relied upon the award would have been different or cannot stand on its own reasoning, then the award is *prima facie* an unreasonable award. Finally, the court must have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained on the *Sidumo* test. Put more plainly, the review court must ask whether but for the defect, a reasonable decision-maker could have come to the conclusion reached in the award on the same material.”

“When conducting this analysis, the review court must avoid falling into the trap of what the Labour Appeal Court in *Gold Fields* referred to as a ‘piecemeal analysis’ of each of the arbitrator’s findings. The question to be answered ultimately is whether on the totality of the evidence, a relationship of reasonableness exists between that evidence and the result reached by the arbitrator.”

evidence, as to why the one version was preferred over the other². Thus, reliance by the Commissioner on unsupported evidence, or evidence not placed before him or her, or speculation, or evidence insufficiently reasonable to justify a conclusion, will render the award reviewable. The same principle will be applicable where the Commissioner for reasons unknown, completely ignores material evidence, especially one that was not contradicted³.

- [15] Applying the above principles to the facts of this case, and further having had regard to the record of proceedings, the award and the submissions made on behalf of the parties, it is my view that the conclusions reached by the Commissioner that Marula had not discharged the onus placed on it to prove the misconduct are clearly not supported by the evidence before him. My conclusions in this regard are fortified by the following;
- [16] It was common cause that Mafologela was seen operating the dump truck in reverse mode as he emerged from underground onto the open road in the mine premises. Lumphoko and Mpofu viewed such conduct as posing a danger to other employees. It was further common cause that Mafologela was called to the podium where employees were gathered for a safety meeting. The issue is whether he was instructed by Lumphoko to apologise to the other employees for his conduct, and whether in response, he had uttered the verbal abuse attributed to him and gesticulated in an inappropriate manner.
- [17] It can be accepted from the evidence of both Mpofu and Tshiguvho that operating the dump truck in reverse mode on the premises was not necessarily prohibited. The issue however is whether Mafologela did so without endangering the safety of other employees on the premises.
- [18] Mafologela may have observed the safety rules as he operated the machinery as he had alleged. It is however improbable in my view that he would have been randomly selected amongst all the other trucks and vehicles operating in the area at the time, and be told to stop unless Lumphoko as Mine Manager

² See *Sasol Mining (Pty) Ltd v Ngqeleni NO & Others* (2011) 32 ILJ (LC) at para [9]; *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others* 2003 (1) SA 11 (SCA) para 14I–15E

³ See *Bestel v Astral Operations Ltd and Others* [2011] 2 BLLR 129 (LAC) at paras 13 - 15

and Mpofu had a valid reason to believe that his conduct posed a danger to other employees.

- [19] Having been told to stop operating the truck and to approach the podium, Mafologela conceded that Lumphoko had asked him what it was that he was taught at the training centre. He nonetheless denied having been instructed to apologise to other employees or having uttered the abusive language as he gestured with his hands. The Commissioner's point of departure in this regard was to attack the credibility of Mpofu on the basis that even though he was within earshot of Lumphoko at the time of the incident, he had heard everything said by Lumphoko and Mafologela, except the instruction to the latter to apologise. Mpofu's credibility was also attacked on the basis that he was evasive when asked whether it was against the rules to operate the truck in reverse mode. The Commissioner having found Mpofu's recollection of events unconvincing, proceeded to attack his evidence as being *'akin to trumped up defense intended at justifying the decision that was taken against'* Mafologela.
- [20] The Commissioner's conclusions in this regard are extraordinary in the extreme, and it is not clear what the basis thereof was. I have had regard to the record of arbitration proceedings and in particular, Mpofu's evidence. His cross-examination centred around whether there was a rule against operating machinery in reverse, whether he had heard Lumphoko instructing Mafologela to apologise, and whether the abusive language in question was uttered. I accept that Mpofu might have been long-winded in his response to a question whether it was against the rules or not to operate the truck in reverse gear, but ultimately, his answer was that it was not.
- [21] The issue of whether or not there was a rule prohibiting the operation of trucks in reverse mode was moot in any event in the light of the concession, and was by all accounts not definitive of Mpofu's credibility and overall reliability of his testimony. The only issue for consideration in that regard was whether Mafologela had operated the truck in reverse mode which posed a safety concern to other employees necessitating the intervention of Lumphoko and Mpofu.

- [22] In regards to whether Mpofu was evasive when asked about whether he had heard Lumphoko instructing Mafologela to apologise, his direct response was that he had not heard it, and I further fail to appreciate how a negative inference could have been drawn from that response.
- [23] Crucial however is that Mpofu consistently stated that he was close to Mafologela on the podium when he uttered the verbal abuse. Not once was it put to him during his cross-examination that his evidence in that regard was motivated by any desire to have Mafologela dismissed for no reason, or was a defence 'trumped up to justify charges' against Mafologela. On the contrary, Mpofu repeatedly testified that Mafologela had uttered the abuse as he gestured with his hands because he might have been emotional, angry or tired. If Mpofu was indeed bent on seeing Mafologela dismissed for untoward reasons, I fail to appreciate the reason that he would seek to offer some justification that might excuse his conduct.
- [24] For the Commissioner to therefore have drawn adverse inferences from Mpofu's evidence when his version withstood cross-examination, or where he had made concessions, or when certain versions were not put to him, clearly that amounts to gross irregularity. It is not the function of a Commissioner to find some evidence or rely upon facts that were never presented or tested, even when making credibility findings. Clearly the Commissioner's conclusions that Mpofu sought to justify trumped up charges against Mafologela are based on nothing but conjecture.
- [25] For reasons that are not discernable, the Commissioner heaped praises on Mafologela, describing him as '*a level-headed individual who would hardly insult or offend anyone without provocation*'. The basis of that assessment is not clear when contrasted with the overall objective facts gleaned from the record of proceedings, and from which the following conclusions can be made;
- 25.1 It should be accepted that Mafologela was indeed told to stop operating the truck as he had done so in an unsafe manner, even if there was no rule against operating the truck in reverse mode;

- 25.2 As his conduct of operating the truck at the time posed a danger to others, Lumphoko out of concern had instructed Mafologela to approach the podium to explain his conduct to his colleagues who had gathered for a safety meeting.
- 25.3 The high watermark of Mafologela's testimony was that after stopping the truck and as he approached the podium, he had heard Lumphoko saying that he was going to dismiss him, which threat he had repeated, hence his gestures. It is remarkable that Mafologela could have heard Lumphoko say that he was to be dismissed, and yet missed everything else that Lumphoko said, including instructing him to apologise to his colleagues for his conduct or to explain his conduct. Even if Mpofu had not heard the instruction, both Lumphoko and Tshiguvho confirmed that such an instruction was issued, and were steadfast that Mafologela had uttered the verbal abuse as he gestured with his hands. According to Tshiguvho and Mpofu, Mafologela as part of his response to the instruction to apologise, also told Lumphoko that he could do whatever he wanted to do, something which does not appear to have been challenged during the arbitration proceedings.
- 25.4 Like Mafologela's testimony, Phoku on his behalf also for some reason, heard everything else that Lumphoko had said to Mafologela, except the instruction to apologise, and the verbal abuse. It cannot be a coincidence that both Mafologela and Phoku would have selective hearing abilities, a factor which the Commissioner completely ignored when making his findings.
- 25.5 In the light of Mafologela's bare denials as contrasted with the evidence of three corroborating versions of Lumphoko, Mpofu and Tshiguvho especially in regard to the verbal abuse, and in the absence of any other conspiracy theory, the invariable conclusion to be reached is that indeed an instruction was issued to Mafologela to apologise for his conduct, and it is improbable that he could have heard anything else said to him as he approached the podium, except the instruction to apologise. Furthermore, the probabilities are even higher that that

indeed he had uttered the verbal abuse towards Lumphoko. Even if Lumphoko might have belatedly said so, all he needed in the light of the seriousness with which safety was dealt with at the mine, was an apology from Mafologela. However, that instruction was met with defiance and expletives, which was wholly unprovoked and unwarranted under the circumstances.

- [26] It was further common cause that as Mafologela responded to the instruction to apologise in the manner he had, he had also gestured with his hands, which conduct according to Lumphoko, Mpofu and Tshiguvho, was inappropriate. It is not clear from the record as to how those gestures were demonstrated, and the Court will refrain from making any findings in that regard. The Commissioner's conclusions however that his findings would have been different had Mafologela's gesture been in the form of 'showing a middle finger' cannot be sustained. The standard of impudence/insolence/insubordination cannot be met or raised solely by a 'show of the middle finger'. Other less crude or rude gestures can be indicative of such conduct.
- [27] Having found that Mafologela was indeed instructed to stop operating the truck as it had posed a danger to other employees, and to apologise for his conduct, and further having found that on the evidence, the probabilities are high that he had indeed responded with abusive language towards a Mine Manager, the next issue for consideration is whether a sanction of dismissal was fair.
- [28] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*, it was held that;
- “...acts of mere insolence and insubordination do not justify dismissal unless they are serious and wilful. A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. Likewise, insolent or disrespectful conduct towards an employer will only justify dismissal if it is wilful and serious. The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as

respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. Thus, unless the insolence or insubordination is of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal"⁴

- [29] In this case, Mafologela's conduct was viewed by a Mine Manager to have posed a threat to the safety of other employees. He was instructed to explain himself and to apologise to his colleagues for his conduct, which had he done, it would have been the end of the matter. Instead, he wilfully responded to the instruction in a defiant manner accompanied by crude verbal abuse and further dared Lumphoko to 'do whatever he wanted to do'. Surely that response not only posed a serious challenge to Lumphoko's authority as a Mine Manager, but was also demeaning of his authority. Throughout the arbitration proceedings, not once had he shown any form of contrition. Even if he had been told that he was going to be dismissed by Lumphoko, to the extent that the conduct for which he was expected to have accounted for posed a threat to the safety of others, coupled with his crude and defiant response thereto in front of other employees, that in my view was serious enough to call for the harshest sanction. It is unacceptable for a junior employee to verbally abuse and dare a senior employee, especially in front of other subordinates.
- [30] It follows from the above conclusions that the conclusions reached by the Commissioner that Marula had not discharged the onus placed on it to prove that the misconduct in question was committed, are conclusions which a reasonable decision maker could not have come to in the light of the material presented before him. Further in the light of these conclusions and the complete record of proceedings that is before the Court, it is found that no purpose would be served by remitting the matter to the CCMA, as the court is in a position to substitute the Commissioner's findings. I have further had regard to the issue of costs, and based on the requirements of law and fairness, I hold the view that a costs order is not warranted in this case.

⁴ [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC) at para [22]

[31] Accordingly, the following order is made;

Order:

1. The arbitration award issued by the Second Respondent under case number LP993/15 is reviewed, set aside and substituted with an order that the dismissal of Mr Phineas Mafologela by Marula Platinum (Proprietary) Limited was fair.
2. There is no order as to costs

E Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: J Norval of Edward Nathan Sonnenbergs INC

For the Third Respondent: PD Marais (AMCU Official)

LABOUR COURT