IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR674/18

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION obo GLADILE AND 4 OTHERS — **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION — **First Respondent**

COMMISSIONER M.S RAFFEE *N.O.* — **Second Respondent**

SIBANYE GOLD LTD — **Third Respondent**

Heard: 12 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 11 March 2025

JUDGMENT

TLHOTLHALEMAJE, J

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Introduction:

[1] In this opposed application, the applicants (AMCU representing the individual applicants), approached this Court seeking an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner), acting under the auspices of the first respondent, Commission for Conciliation Mediation and Arbitration (CCMA).

[2] In the award, the Commissioner had found that the dismissal of the individual applicants, viz, Nkosiyethu Gladile; Thamsanqa Ntshangase; Delevile Sanda, Simthembile Mkhiva and Ntombivumile Jala) by the third respondent, (Sibanye Gold (Pty) Ltd) (Sibanye), was substantively fair. (The fifth individual applicant, Jali, is since deceased). Sibanye has opposed the review application.

Background and evidence before the Commissioner:

[3] The individual applicants were employed in different capacities and at varying times by Sibanye at its underground Cooke Operations (Operations). It was not disputed that in an endeavour to curb illegal mining activities at its Operations, Sibanye had entered into a Memorandum of Agreement (MOU) on 5 May 2016 with representative unions, the National Union of Mineworkers and UASA.

[4] In terms of the MOU, the parties agreed *inter alia*, to institute a total food ban, prohibiting the employees from taking any food items with them when reporting for duties underground. The MOU was to be in place for a period of 45 days from the date of its signature, and the food ban was to be revised within 14 days from its implementation, to assess its effectiveness in combating illegal mining activities. It was further provided in the MOU that a failure by any employee to comply with the food ban would result in them being prevented from proceeding underground and further being subjected to disciplinary action.

[5] Sibanye informed all the employees of the food ban through a brief that was placed on all notice boards at the Operations, including at boards next to the

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turnstiles where employees clocked in, and all security guard rooms. A meeting was also held with the employees on 6 May 2016 where the ban was further explained to them.

[6] Resulting from the implementation of the food ban, the individual applicants were charged and subjected to a disciplinary enquiry into allegations of 'gross misconduct and/or behaviour prejudicial to the maintenance of good order, in that on 13 May 2016 at about 04h45 at Cooke 2, they had;

(a) Allegedly refused to obey a reasonable lawful instruction from Protection Officers, not to take foodstuff underground;

(b) Incitement - in that on the abovementioned date, time and place, they allegedly incited a number of fellow employees not to comply with a rule prohibiting the taking of food stuff underground;

(c) Gross misconduct and/or behaviour prejudicial to the maintenance of good order in that they allegedly threatened to assault Protection Services Officers, who instructed them not to take foodstuff underground.'

[7] Following an internal disciplinary hearing, the individual applicants were dismissed on account of the first two allegations. An alleged unfair dismissal dispute was referred to the CCMA, and when attempts at conciliation failed, the matter came before the Commissioner who had issued the impugned award.

[8] In support of the allegations and subsequent dismissal of the individual applicants, Sibanye's case was presented before the Commissioner through its witnesses, viz, Ms Patricia Khambule (Fidelity Guards' Services Relief Supervisor), Mr Makhethe (Sibanye's Protection Services),Mr Charles Sithole (Reaction Officer) and Mr Ednan Botha (Protection Services Officer. The applicants on the other hand relied on the evidence of Sanda and Mkhive.

Sibanye's evidence:

[9] The food ban was adhered to by all employees until 13 May 2016. This was when the individual applicants were allegedly found with food items in their possession at what is referred to as the 'crush area', as they attempted to go

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underground via a ‘cage’ (lift). Sibanye further contends that at the time that the individual applicants attempted to take foodstuff with them underground, there was another group of employees that was standing aside from the entrance to the cage, after security officers had prevented them from proceeding underground because they were in possession of food items. These employees were instructed by security officers to stand separately and away from the entrance and were allowed to consume whatever food items they had with them, before they could be permitted to proceed underground.

[10] Khambule had testified that she had approached the individual applicants and having noticed the food items they had in their possession, informed them that in accordance with the food ban, it was either they consumed the food at that point and away from the entrance to the ‘cage’, or took it back to their locker rooms before they could proceed underground. She had observed that two of the individual applicants, viz, Sanda and Gladile, were carrying food items in a lunchbox and plastic bag respectively. Khambule testified that after she spoke to the two about the food ban, Gladile responded to her by saying that they were going underground with their food items, irrespective of whether she (Khambule), liked it or not. Khambule then called Makhethe and informed him of the Gladile’s and Sanda’s posture and intention to take their food items with them underground.

[11] Makhethe’s testimony was that on 13 May 2016, the security officers at the guardhouse were busy attending to a number of illegal miners that were arrested the previous night. The arrests came about after he had received a call from underground, informing him that these illegal miners had wanted to come out from their hiding places underground as they were hungry. As a result of the food ban that had taken place since 5 May 2016, the illegal miners had no access to food to sustain them whilst they continued with their illegal activities underground.

[12] Makhethe testified that upon responding to Khambule’s call, he had observed Gladile and Ntshangase, carrying food items, with the latter also carrying a lunchbox. He had again reiterated the food ban to them and further warned them of the consequences of failing to adhere to the ban. Gladile, who had a bag of fat cakes in his hand, however said to him that whether he liked it or not, he was going

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underground with his food. It was at that stage that Makhethe had called Sibanye's control room and requested back-up from other Reaction Officers.

[13] According to Khambule, the individual applicants were at all material times standing near the guard room. Gladile had at some point, approached the separate groups of employees and appeared to be talking to them. Upon Gladile going back to the other individual applicants, a cluster of employees had formed after he (Gladile) had gestured to them and had made their way towards the turnstiles in a concerted effort to proceed underground.

[14] When security reinforcement arrived at the turnstiles, one of the Reaction Officer, Charles Sithole accompanied by his colleague, Mthethwa, approached the individual applicants and reminded them of the food ban. At that time, the group of employees kept approaching the turnstiles, forcing Khambule to retreat to the control room out of fear.

[15] Sithole, who was patrolling at Cooke 1 Operations, confirmed having received a call from the Control Room advising of problems at the Cooke 2 'crush', and had thereafter joined Mthethwa and other security officers who were already at the site. They were met by Khambule who had identified the individual applicants as having refused to adhere to the food ban. As Sithole was attempting to speak to them, the employees had surrounded him and Mthethwa, and he confirmed having seen one of the employees calling another group that was standing not far away. The group of employees then ultimately reached the turnstiles despite efforts by Sithole and other security officers to stop them and thereafter managed to get into the 'cage' and proceeded to underground with their food items. Out of caution, the security officers had refrained from using force to quell the situation and stopping the group of employees from proceeding to underground.

The applicants' case:

[16] Sanda's testimony on behalf of the other individual applicants was that he was merely standing next to the turnstiles waiting for a 'cage' to take him underground. He had acknowledged that there were initially two security officers

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present at the site including Khambule, and that at some stage, they were joined by two other guards. When the other two came at the site, they had said that Khambule had reported that they had food items in their possession. His bag was searched but nothing was found. He was thereafter released and had proceeded to go underground. It was only when he and other individual applicants returned from underground at a later stage, that Khambule had identified them other than Gladile, as having taken food items underground.

[17] Sanda testified that no meetings were held with AMCU about the food ban before and after it was implemented. He further testified that he and Khambule used to have a 'relationship', and that following a quarrel between them about payment of some money he had promised her, Khambule had informed him that she will 'get him'. Sanda essentially blames his dismissal as retaliation by Khambule for not paying her the amount she had promised her and reiterated his denial that he had taken food items underground.

[18] Mkhiva's testimony on behalf of the applicants was also to essentially deny the allegations against them. He had testified that all the individual applicants' bags were searched, and after no food items were found in their possession, they were allowed to proceed underground.

Commissioner's findings:

[19] Against the above summarised evidence tendered by various witnesses over three days, inclusive of video evidence that was presented by Sibanye, the Commissioner in a brief analysis took into account the applicants' denials of any wrong doing, their contention that nothing was found in their bags after a search, and Sanda's allegation that Khambule was responsible for their dismissal on the basis of his prior relationship with her. The Commissioner concluded that the defence in regard to Sanda's relationship with Khambule was far-fetched, and that notwithstanding the individual applicants' denial of knowledge of the food ban and further contention that no food items were found in their bags, the balance of probabilities favoured Sibanye's version, hence the dismissals were substantively fair.

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Test on review:

[20] The review court must determine whether the decision reached by a commissioner on the material before him can be said to have been one that a reasonable decision maker could not reach[1]. From a long line of authorities[2] since *Sidumo*, it is settled that the essence of the test is that the review court must ascertain whether the commissioner considered the principal issues before him; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions arrived at. As has been stated on countless occasions, the function of this Court in such review applications is not to judge the correctness of the Commissioner's decision, but rather to determine whether, having regard to the totality of the evidence that served before her/him, the decision is one that a reasonable decision-maker would not make[3].

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[1] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

[2] *Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) v Commission for Conciliation, Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC); *Herholdt v Nedbank Ltd* (701/2012) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA); *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC), where it was held;

"[41] *Sidumo* cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.

[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons."

[3] See *Securitas Specialised Services (Pty) Limited v Kabelane and Others* (2021) 42 ILJ 833 (LAC), at para 20, where it was held that;

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The grounds of review and evaluation:

(i) Award not reasonable:

[21] The applicants attacked the Commissioner's award on various grounds including that it was not reasonable in the light of the brevity of the analysis and reasoning, considering the number of witnesses that had testified and the duration of the arbitration proceedings. Sibanye's contention on the other hand was that the review was not supported by any evidence led by the individual applicants, and that the application was an attempt to make out a new case which was not before the Commissioner. It was contended that it was irrelevant whether the Commissioner's analysis and reasoning was brief in that the provisions of section 138 (7) of the Labour Relations Act (LRA)[4], permitted the Commissioner to identify the nub of the dispute, which he had done. It was submitted that the award was reasonable in the light of the totality of the evidence presented at the arbitration proceedings.

[22] It is correct that under section 138 of the LRA, commissioners are required to determine the disputes fairly, quickly and with minimum of formalities, and to also 'issue brief reasons'. As to what is meant by 'brief reasons' is subject to interpretation based on the facts and circumstances of each case. It can however be deduced from the test on review as already indicated elsewhere in this judgment,

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"The test for review is this: "Is the decision reached by the arbitrator wonder that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justifications for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator. This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision maker could make."

[4] Act 66 of 1995.

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and further based on the *dictum* in *Duncanmec*[5], that 'brief reasons' can only be in relation to whether those reasons support the award or ultimate outcome arrived at. This is irrespective of the brevity of the award, and whether the Court agrees with those reasons or not. Against this approach, the Court needs to ascertain whether the commissioner considered the principal issues before him and evaluated the facts presented at the hearing.

[23] It was submitted on behalf of the applicants that in the light of the brevity in the analysis and reasoning, the Commissioner failed to properly consider and deal with the evidence including the video evidence and factual disputes that were before him and also failed to make any findings regarding the specific charges. This it was argued, particularly in the light of the various disputes of fact arising mainly from the denials by the applicants. Sibanye however contends that there were no genuine disputes of facts in the matter.

[24] Be that as it may, the Court accepts that some of the denials were indeed not genuine, whilst others could not simply be brushed off as bare as shall be illustrated below. Where the Court accepts that some of the denials may have created genuine disputes of fact, it is trite that the approach to be ordinarily adopted in resolving such disputes is that as enunciated in *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others*[6]. Thus, the Commissioner was

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[5] *Supra.*

[6] [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5 where it was held that;

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying

required to probe into the credibility of the various factual witnesses; the reliability of their evidence; and the probabilities in the matter.

[25] In this case, the Commissioner essentially identified three defences raised by the applicants, viz, that they were searched and no food items were found in their possession hence they had proceeded to go underground; Sanda's version that Khambule had falsely identified him and others because of his prior relationship with her which had soured (what the Commissioner referred to as 'conspiracy theory'); and denial of knowledge of the rule regarding the food ban.

[26] On the evidence before the Commissioner, the defence or the conspiracy theory as raised by Sanda was clearly a red herring, whilst the probabilities did not favour the individual applicants' denials that they did not know of the food ban. In this regard, I did not understand from the evidence that the individual applicants had disputed that following the MOU, meetings were held with employees, and the notices of the food ban were placed at all entrances, locker rooms and any other places where they were visible to all the employees. The individual applicants' contention that they could not have known of the ban simply because no meetings were held with AMCU in that regard does not assist their case in the light of Sibanye's endeavours in publicising the ban.

[27] This therefore leaves the applicants' defence that their bags were searched and that no food items were found, hence they had proceeded to go underground. There is nothing in the award that indicated the basis upon which the Commissioner had made any finding in this regard. It was correctly submitted on behalf of the

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about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

applicants that overall, the Commissioner's award is completely devoid of any reasons leading to the findings. It is not known what factors were considered in determining that the balance of probabilities favoured the version of Sibanye.

[28] In *Stokwe*[7], it was reiterated that in determining whether the commissioner's award is reviewable, the substantive fairness of the applicants' dismissal is pertinent, and it was necessary to have regard to what the essence of the charges proffered against the applicants entailed, and more specifically, which rule(s) were they alleged to have breached. In this case, the individual applicants were dismissed for allegedly having breached the food ban by taking food items with them underground and also inciting fellow employees not to comply with the food ban.

[29] Inasmuch as Khambule and Makhete had identified Sanda, Gladile and Ntshangase as some of the individual applicants that were carrying food items prior to proceeding underground, or had incited other employees not to comply with the food ban, the Commissioner in his findings did not make any determination as to whether all the individual applicants were guilty of these charges and the circumstances that may have led to that conclusion on a balance of probabilities.

[30] It was against this irregularity that it was correctly submitted on behalf of the applicants that the Commissioner had adopted a 'blanket approach when confirming the misconduct in respect of all the individual applicants, without making any distinction as to whether they were all guilty of the two specific charges preferred against them, and most importantly, without stating the basis of that conclusion. A general statement to the effect that a version was more probable than the other without more, cannot result in any reasonable outcome.

[31] Other than the above irregularities, it is trite flowing from item 7 of the Code of Good Practice in Schedule 8 of the LRA read with *Sidumo*[8], that in determining the fairness of a dismissal, the Commissioner is obliged to have regard to various

[7] *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* [2019] ZACC 3; (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC); [2019] 6 BLLR 524 (CC) at para 57.

[8] At paras 179-183.

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factors. In this case, there is nothing discernible from the award to indicate what factors were taken into account when determining whether the sanction of a dismissal was appropriate in respect of all the individual applicants.

[32] Flowing from the above observations, it ought to be concluded that the commissioner committed various reviewable irregularities, more particularly since there was an apparent failure to undertake a proper and careful analysis of the evidence. The irregularities in the end had a distorting effect on the outcome arrived at by the Commissioner, necessitating that the award be reviewed and set aside.

[33] The only issue is whether the Court should substitute the award with its own order as sought by the applicants. They had sought that the award should be substituted with an order that the dismissals were substantively unfair and that they should be reinstated. The Court appreciates the delays since the dismissals, inclusive of those attributable to the need to seek a reinstatement of the review application after it was deemed withdrawn, and those regrettably flowing from the late delivery of this judgment. The Court is however disinclined to consider the order sought by the applicants in the light of the irregularities pointed out in the award.

[34] The Court however agrees with the submission that the matter be remitted to the CCMA for reconsideration by another commissioner, but on the same record as was before the Commissioner in this review application. It further follows from the order proposed that any award of costs is not warranted in this case.

[35] Accordingly, the following order is made:

Order:

1. The arbitration award issued by the Second Respondent is reviewed and set aside.
2. The dispute between the parties is remitted to the First Respondent (CCMA), to be heard before a commissioner other than the Second Respondent.

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3. The First Respondent (CCMA), shall enrol the matter on an expedited date before a Senior Commissioner, who shall determine the matter on the same record as was before the Court in the review application

4. There is no order as to costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:S Saunders, instructed by LDA Incorporated Attorneys.

For the Third Respondent:G Fourie SC, instructed by Solomon Holmes Attorneys

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