



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR2285/21

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION ('AMCU') obo MAFOKANE MJ** Applicant

and

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

ELELWANI HLUNGWANI N.O. Second Respondent

IMPALA PLATINUM LTD Third Respondent

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 5 April 2025

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In this opposed application, the union AMCU, representing its member Mr. Mafokane, seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner). In the award, the Commissioner had found that the dismissal of Mafokane by the third respondent (Impala) on account of misconduct, was procedurally and substantively fair.

Background and the evidence before the Commissioner:

[2] Mafokane was employed by Impala from September 2013 as a Rock Drill Operator. He was dismissed on 18 December 2020 following a disciplinary enquiry into allegations of misconduct. Central to the allegation was that he had in March 2021, assaulted a fellow employee (Mr Levy Tshubungwana) whilst they were performing their duties underground. The allegation was that Mafokane threw a stone at Tshubungwana, resulting in an injury on top of his eye.

[3] Following Mafokane's dismissal, an unfair dismissal dispute was referred to the first respondent, Commission for Conciliation Mediation and Arbitration (CCMA), and when attempts at conciliation failed, the matter came before the Commissioner.

Impala's case before the Commissioner:

[4] At the commencement of the proceedings, it was recorded as common cause that Tshubungwana, who was employed as a Winch Operator, was indeed injured and bleeding after the incident. This had required his hospitalisation as the injury required surgery.

[5] From a reading of the transcribed record of the proceedings and as also as recorded in the award by the Commissioner, the evidence of Tshubungwana was simply that he and Mafokane were the only people performing their duties at the site of the incident. Mafokane threw a stone that hit him on top of his eye. He had testified that despite Mafokane having seen that he was injured and bleeding, he had nonetheless continued performing his duties. Tshubungwana testified that he left the

site and went to report the matter to the Supervisor/Miner. An ambulance was summoned and he was taken to a hospital for treatment.

[6] Arising from a cross-examination which was hard to follow from the record, it appears that an attempt was made by Mafokane's representative to put to Tshubungwana that the nature of operations underground was such that because of hanging walls, a stone could have fallen and hit him, hence it was reported. Tshubungwana's response was that indeed every injury that occurred underground resulting from rock falls had to be reported. He had however maintained that it was Mafokane that threw the stone at him. As to the reason Mafokane had done that was left unexplored with him.

[7] Impala's Senior HR Coordinator, Ms Leah Rapoo's testimony was to confirm the provisions of the Disciplinary Code and Procedure regarding the sanction to be imposed for assault, which was a dismissal. Her testimony merely pertained to the procedural fairness of the dismissal. The Commissioner had found that the dismissal was procedurally fair.

[8] AMCU in its review does not challenge the Commissioner's findings on procedural fairness and accordingly, Rapoo's testimony for the purposes of this review application is relevant only to the extent that it confirmed the provisions of Impala's Disciplinary Code.

Mafokane's version:

[9] Mafokane testified that he and Tshubungwana were cleaning their working area called the 'face'. Part of his functions as they were cleaning was to pass or throw rocks or stones to Tshubungwana, who was about three meters from him. Tshubungwana was in turn to catch and place them at a different place referred to as the 'centre line'. He testified that he did not notice the injury to Tshubungwana and contended that he did not even know how it occurred. He testified that he only heard about the injury at a later stage from the Miner at about 11:00, when he was busy drilling. Mafokane testified that he had a good working relationship with Tshubungwana and contended that he did not know anything about an assault.

[10] Under cross-examination, Mafokane testified that Tshubungwana might have been injured when they were busy cleaning their workplace, and/or that the stones that he was throwing at him to catch may have bounced off the floor and hit him causing the injury. He persisted with his contention that he did not see how the injury took place and denied that he was alerted to it at the time that it occurred. He further testified that he even went to the hospital to see Tshubungwana after he heard of the injury.

[11] Mafokane further testified that the dismissal was inappropriate and he ought to have been issued with a lesser sanction since he was 'informed' that he was guilty. He in the same token contended that the injury to Tshubungwana was not intentional but was because of a mistake.

The Commissioner's findings:

[12] Regarding substantive fairness, the Commissioner identified the issues for determination as being whether the misconduct of assault was committed and thus in breach of workplace rules, and if so, whether the sanction of a dismissal was appropriate.

[13] The Commissioner's starting point was to define what the offence of assault entailed. He also considered the evidence and held that even if the assault or injury was not intentional, the probabilities were that Mafokane had seen that Tshubungwana was injured and bleeding but had nevertheless continued performing his tasks and failed to react or assist him. The Commissioner further found that the mere fact that an ambulance was called resulting in Tshubungwana's hospitalisation indicated that the injury was serious, and on that basis, Mafokane had committed the misconduct of assault, and in breach of the rules.

[14] The Commissioner had regard to Rapoo's evidence and Impala's Disciplinary Code and concluded that a dismissal was appropriate in the circumstances, more particularly since the injury was not because of a mistake, and further since Mafokane had not shown any remorse.

The grounds of review and evaluation:

[15] Central to AMCU's grounds of review is that the Commissioner's award fell outside the bounds of reasonableness in that Impala did not prove all the elements of the offence of assault. It is further contended that the Commissioner failed to consider other evidence relating to the alleged assault; failed to consider mitigating and aggravating circumstances; and further failed to consider the appropriateness of the sanction.

[16] It is trite that 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 reach¹. From a long line of authorities² 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 arrived at a conclusion which was reasonable to justify the decisions arrived at.

[17] It is apparent from the grounds of review as summarised above that what AMCU complains of, is the general assessment of the evidence by the Commissioner. In such cases as recently pointed out in *Glencore Operations South*

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."

*Africa (Pty) Ltd v Thokozani Taala and Others*³ (Glencore), this approach raises red flags of an appeal, rather than the more limited, permissible recourse of review. For the Court to intervene in such instances, AMCU must first, demonstrates some reviewable irregularity on the part of the commissioner in the assessment of the evidence, that has the consequence of an unreasonable result. Secondly, that the factual conclusions that the commissioner drew were untenable, rendering the award one to which no reasonable decision-maker could come⁴. Thus, even if the record discloses a reviewable irregularity in relation to the commissioner's conduct or reasoning, provided the result or outcome falls within a band of decisions which a reasonable decision-maker could reach on the available evidence, the award cannot be assailed⁵.

[18] In this case, it cannot be disputed that the Commissioner correctly identified the issues in dispute. These were whether the offence of assault was proven in the sense that Impala had discharged the onus in that regard, and if the offence was proven, whether the sanction of a dismissal was appropriate.

[19] Regarding whether the offence of assault was proven, it was not in dispute that Mafokane and Tshubungwana were the only two employees at the scene. It was further not in dispute that a stone injured Tshubungwana, causing a deep laceration above his left eye. This had necessitated that an ambulance be called, resulting in his hospitalisation as he was required to undergo surgery. Clearly the injury was serious as the Commissioner had correctly concluded.

[20] The only issue was whether the injury was caused intentionally, for the purposes of a finding of an assault. Tshubungwana's evidence was that as they were cleaning the 'face' and passing rocks/stones from one place to the other, Mafokane threw a stone directly in his face that caused the injury. Having suffered a serious injury, Tshubungwana had left the site and reported the matter to the Miner, resulting in the chain of events I have already alluded to. On Tshubungwana's version, as he left the site to get medical assistance, Mafokane had continued performing his tasks

³ Case no: JA 52/24 (Delivered on 27 March 2025) (Not Reportable)

⁴ At para 25

⁵ At para 23

(drilling) as if nothing had happened. The Commissioner had upon an assessment of the evidence, concluded that in the light of the nature of the injury and the distance between Mafokane and Tshubungwana when the incident occurred, it was improbable that Mafokane could not have seen the injury and the bleeding.

[21] In my view that assessment and conclusions cannot be faulted. This is so in that throughout Tshubungwana's evidence, not once was it put to him that Mafokane did not see the injury, or that it was because of an accident. The version that the injury was caused by mistake or was because of a stone thrown at him to catch having bounced off the floor, only came to light when Mafokane testified. The point being made is that from the evidence led as can be gleaned from the transcribed record, it is difficult to appreciate how the Commissioner could have concluded that the injury was not intentional, in circumstances where it was not put to Tshubungwana to rebut or confirm any lack of intention on the part of Mafokane.

[22] The probabilities as correctly found by the Commissioner, were that Mafokane threw a stone at Tshubungwana for whatever reason that is unclear, saw the injury and did nothing. Any person under the circumstances, who meant no intentional harm to a fellow employee who was injured and bleeding, would have immediately assisted and taken responsibility for his 'mistake'. The mere fact that Mafokane consistently denied having seen the injury or the bleeding until at a later stage, coupled with versions that were not put to Tshubungwana, clearly point to improbabilities of those versions.

[23] It was submitted on behalf of AMCU that the Commissioner committed a reviewable irregularity to the extent that he failed to remedy the inadequacies in the testimony of the witnesses. It was added that there was no evidence before the Commissioner as to why Mafokane would have assaulted Tshubungwana.

[24] The above proposition if properly understood, is that since there was inadequate evidence, the Commissioner ought to have elicited more evidence from the witnesses even if such an approach would have crossed the boundaries of extending the 'helping hand'. It is my view that the function of a commissioner where parties are represented, is confined to asking clarity seeking questions, rather than

prompting the witnesses to give answers that may or not be favourable to their respective cases. To do so would encroach on the principles of a fair trial. In this regard, as to the reason why Mafokane would have assaulted Tshubungwana was an issue not explored with the witnesses, other than that Mafokane had merely indicated that he and Tshubungwana had a good relationship, and that he even went to the hospital after he heard of his injury. Of course, these issues do not disprove intention.

[25] In view of the unassailable conclusions of the commissioner on the question of intent, the only issue remaining was whether the sanction of a dismissal was appropriate. The Commissioner had identified the factors that led him to conclude that the dismissal was appropriate. Of course, the issue of long service and clean record are factors to be equally considered. But these are amongst others that ought to be considered and are not definitive on their own.

[26] The appropriateness of a sanction is not a stand-alone element of fairness, as it must be viewed within the context of the nature and seriousness of the misconduct complained of, the employee's challenge or defence to the allegations, and the totality of the evidence.

[27] Recently in *Algoa Bus Company (Pty) Ltd v TASWU obo Mzawi and Others*⁶, it was held that the nature of the misconduct and the actual or potential consequences are relevant factors in the determination of an appropriate penalty⁷. It was added that;

'In sum: contrary to what the Labour Court held, there is no obligation in law on an employer to adduce evidence on the appropriateness or suitability of dismissal as a sanction for misconduct, as a necessary condition for any finding of unfair dismissal. An arbitrator making a decision on the appropriateness of dismissal as a sanction for misconduct must make a value judgment, taking into account all relevant facts and circumstances. A breakdown in trust or deterioration in the employment relationship may be inferred from the evidence regarding these facts and circumstances...'⁸

⁶ (PA05/23) [2024] ZALAC 42; [2024] 12 BLLR 1224 (LAC); (2025) 46 ILJ 89 (LAC).

⁷ At para 13

⁸ At para 17

[28] In this case, Mafokane had contended before the Commissioner that at most he ought to have been issued with a lesser sanction such as a final written warning. This then begs the question as to on what basis should such a sanction be considered, when on his own version he had not only steadfastly denied the allegations, but had conjured up defences that were not put to witnesses, and which were not probable in the light of all the facts. Worst still, and as the Commissioner had correctly held, Mafokane failed to show any form of contrition, even if on his implausible version the injury resulted from an accident. Of course the misconduct was serious, and Mafokane had refused to acknowledge it, let alone deal with its immediate and visible consequences.

[29] Against the totality of the evidence, it ought therefore be concluded that AMCU has not demonstrated any reviewable irregularity on the part of the Commissioner in the assessment of that evidence. In the end, even if the Commissioner's reasoning may be said to have been flawed (Which I believe not to be the case), any alleged irregularity cannot be said to have any distorting effect on the final outcome. Ultimately, it is found that the Commissioner's award falls within a band of reasonableness on the available material, and therefore ought to be upheld.

[30] I have further had regard to the requirements of law and fairness to the extent that any costs order was sought in this case. It is my view that upon the consideration of the facts and circumstances of the review application, any award of costs is nonetheless not warranted.

[31] Accordingly, the following order is made:

Order:

1. The Applicant's application to review and set aside the arbitration award issued by the Third Respondent is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhemaje
Judge of the Labour Court of South Africa

APPEARANCES:

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

For the Third Respondent: Mr A Kruger, of Webber Wentzel

LABOUR COURT