

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J1800/98

In the matter between

POTGIETERSRUS PLATINUM LIMITED

Applicant

and

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

P NDOU

Second Respondent

DOCTOR BALOYI
Third Respondent

ROBERT SEKATANA
Fourth Respondent

NATIONAL UNION OF MINEWORKERS
Fifth Respondent

JUDGEMENT

GON AJ

1. This application is brought to review, correct and set aside an award made by the 2nd respondent on 4 November 1997 under the auspices of the 1st respondent.
2. I am further enjoined by the applicant to substitute for the award a declarator that the dismissal of the 3rd and 4th respondents by the applicant was fair and is upheld.
3. The 3rd to 5th respondents take the *point in limine* that the application for review

can only be made terms of section 145 of the Labour Relations Act, 56 of 1995 ("the Act") and as the proceedings were instituted on 14 July 1998, four months from date of the award to the date of the commencement of these proceedings, the application was not instituted within the prescribed time limit and therefore must be dismissed with costs.

4. The respondents submitted that, alternatively, the application was not instituted within a reasonable time period and the application must be dismissed with costs.
5. The application was brought under section 158(1)(g) which has since been held to be inapplicable to reviews of arbitration awards of commissioners of the 1st respondent, in terms of *Carephone (Pty) Limited v Marcus N O and Others* [1998] 11 BLLR 1093 LAC.
6. The applicant acknowledges in reply that it has not complied with the 6 week time period prescribed by section 145 and seeks condonation for such late filing.
7. The applicant argues that it made the reasonable but erroneous assumption that the application could be brought under section 158(1)(g) which required that the review be brought within a reasonable time. The applicant argued that in the circumstances of preparing a considerable record, the absence of the attorney involved in the arbitration and the necessary cross-referencing which was time consuming, the time taken to file the application was reasonable.
8. The applicant further stated that it had been advised that in terms of the preponderance of authorities, an arbitration award could be reviewed under section 158(1)(g) and therefore it was brought in those terms. The applicant also argued that in the intervening period *Carephone* was handed down on 27 August 1998 which held emphatically that only section 145 applied.
9. The applicant argued that the respondents argued that condonation cannot be granted in terms of judgment of Landman J in *Queenstown Fuel Distributors CC v Labuschagne NO and Others* (1999) 20 ILJ 928 (LC). This issue was not in fact raised in the answering affidavit nor in the respondents' heads of argument. I believe the applicant's representative may have confused this case with another case in which he was involved at the same time as is evident from the applicant's supplementary heads on condonation.
10. In arguing for whether condonation can be granted, the applicant argued firstly for substantive compliance. Secondly, it argued whether, in relation to the provision of a statute which is imperative in nature, the legislature expressly or impliedly, to visits non-compliance with nullity.
11. The applicant argued for a purposive interpretation taking into account equity and fairness and section 27 of the Constitution which entrenches the right to "fair labour practices".
12. I have considered and rejected substantial compliance in the context of condonation under section 145. I have also extensively dealt with whether condonation can be granted in terms of section 145, incorporating much of the argument applicant propounded, in the recent case of *Dimbaza Foundries Limited v the CCMA and Others*, unreported case no. P216/98, 14 May 1999.
13. I concluded that condonation in terms of section 145 can be granted and I have not changed my view in the intervening period. Accordingly, I do not intend to canvass the merits of applicant's argument for condonation in terms of section 145.
14. Having determined that condonation can be granted in terms of section 145, the issue to be decided is whether condonation should be granted to the applicant

according to the principles of *Melane v Santam Insurance Company SA Limited* 1962(A) at 531(a) at 532(C to F).

15. In determining whether good cause for condonation exists one has to look at the extent of the delay, the reasons for the delay, the prospects of success and the importance of the case. The injunction in *Melane* is important to the effect that no one principle is conclusive, they have to be read together and that they can mitigate against an excessive delay. Should there be no prospect of success, the application must fail.
16. The 3rd to 5th respondents argued that the delay of four months in this case was excessive, that three and a half months late in the context of the six weeks time limit is unreasonable, and that there is no explanation for the delay between 28 April 1999 (after receiving the transcription of the 2nd respondent's notes) and the filing of the application.
17. The applicant argued that the delay was not as a result of neglect or culpable conduct by the applicant's attorney, and unless the non-observance of time limits were so flagrant or the applicant so unworthy of consideration, that application for condonation cannot be granted irrespective of the prospects of success, condonation should be granted.
18. The applicant referred to its erroneous assumption that section 158(1)(g) applied and to the numerous authorities in support of section 158(1)(g).
19. With respect to the length of time taken, the applicant referred to the considerable record and the complexity of cross-referencing the record of the disciplinary enquiries and the notes of the arbitrator in order to correctly analyse the deficiencies in the award of the 2nd respondent. The cross-referencing and the transcriptions of the above records were time consuming. The applicant also noted that the respondents did not allege prejudice through the delay.
20. The 1st respondent transcribed the 2nd respondent's notes by 28 April 1998. The applicant also obtained the record of proceedings noted by the applicant's attorney at the time, Mrs Fiona Leppan, and prepared them from her notes.
21. The applicant also referred to the remark of Landman J in *Queenstown Fuel Distributors CC (Supra)* to the effect that the time constraint in section 145 as being "a relatively brief period within which to apply for review".
22. The applicant further argued that it has good prospects of success on the basis that there is no rational objective basis justifying the connection made by the arbitrator between the material before him and his award, such award being neither rational nor objectively justifiable in accordance with the test laid down in *Carephone*. In the circumstances, the 2nd respondent exceeded the substantive constitutional limits to the exercise of his powers in arbitration under the Acts and his award to be reviewed and set aside.
23. Finally the applicant argues that the case is of considerable importance to the applicant because it involves the theft by employees of property worth R10000, it has adopted a consistently firm position with regard to offences of dishonesty and has painstakingly attempted to establish and perpetuate a culture of honesty and trust in its employees and cannot be expected to suffer the dislocation and disruption to its attempts of proper discipline occasioned by a defective award.
24. The delay is not inconsequential in the context of the 6 weeks of section 145. However, the record (including pleadings) is a little under 1000 pages and I can accept that a fair amount of time would be required to analyse it.
25. In addition, the reliance of section 158(1)(g), though misplaced, persuades me to

- give some leeway in light of the period in which the review was launched. Post *Carephone* such excuse is no longer available to an applicant.
26. Success on the merits, in my view, in the circumstances would weigh in favour of the granting of condonation to the applicant.

Background facts

27. The applicant conducts mining operations which entail the use of 574 Gyrator Crusher known as "Big Bruce" and is situated approximately 7 kilometres outside of the mine premises.
28. The applicant also uses an Internal Circulation or small Crusher which is situated in the applicant's grounds approximately 300 to 500 metres from the applicant's workshop.
29. One of the parts of Big Bruce is an eccentric sleeve which is a hollow drum situated in the crusher to ensure it is properly lubricated with oil at all times. The sleeve is made up of a mixture of lead and brass, weighs approximately 700 kilograms and has a scrap value of about R10000.
30. During 1996 the sleeve was removed from Big Bruce and brought to the workshop for repair. It was last seen at 16h00 on 25October1996. When the applicant's employees reported for duty at 08h00 on Saturday, 26October1996 the sleeve was missing.
31. The sleeve was recovered on 30October1996 buried at Ga Molekane Village approximately 2,8 kilometres from the main entrance to the applicant's premises. Investigations implicated the 3rd and 4th respondents for whom disciplinary hearings were held and they were discharged. Their appeals were dismissed. The 2nd respondent subsequently determined their dismissal to be substantively and procedurally unfair and reinstated them.
32. The following facts are not in dispute:
- 32.1 At 700 kilograms it would take about 10 men to lift. It was last seen before its removal in the mechanical workshop which contained hoisting equipment which could have lifted it;
- 32.2 The tipper truck capable of carrying the sleeve was parked behind the workshop. The keys to the truck were in the workshop office. The applicant possessed only one large tipper truck which was grey/white in colour.
- 32.3 The sleeve went missing between 18h00 on 25October1998 and 08h00 on 26October1998.
- 32.4 The sleeve was found at Gamolekane Village at a kraal where DavidTsoeleng (a mine security guard) and Colbert Dombeni resided.
- 32.5 The 3rd respondent stayed at the workshop where he had been on duty on 25October 1996 until 19h00.
- 32.6 Cable Theledi, the shift foreman, said that the 3rd respondent was alone when he left him at 16H15.
- 32.7 The 4th respondent was on duty from 14h00 to 22h00 as a standby driver. He was called to the workshop by the 3rd respondent to transport him to Big Bruce.
33. It was common cause that together the 3rd and 4th respondents left the premises in the big tipper truck and, according to the 3rd respondent's evidence, it was as it was getting dark and "something to seven" (19h00), according to the arbitrator's note.
34. The 3rd and 4th respondent's claimed that they had gone to Big Bruce to top it up

with oil. In the statement to the police the 3rd respondent said he had been told to proceed to Big Bruce for this purpose by William Baloyi, an operator on Big Bruce. Mr Baloyi's testimony at the arbitration was that it was his job to check that Big Bruce was full of oil. He checked it at 12h40 on 25 October 1996 and it was fine. He stated that he did not call the 3rd respondent.

35. In arbitration the 3rd respondent's evidence was that he was called to attend to the oil on Big Bruce by Cable Theledi, who he alleged simply told him that he must check the oil but did not say which crusher. The 3rd respondent said he assumed it was Big Bruce because it often breaks down. It was common cause, however, that Mr Theledi has nothing to do with Big Bruce.

36. The 3rd and 4th respondents' evidence was that there were two drums on the back of the truck – one was empty and one had 15 litres of oil. Empty drums were not allowed to be removed without authorisation. The 3rd and 4th respondents gave no explanation for the unauthorised removal of an empty drum. Another concern of the applicant was that because Big Bruce takes between 600 to 800 litres of oil one would need usually between 50 to 200 litres to top it up. The 3rd respondent's response to that was that Big Bruce used two types of oil and sometimes it only needed 10 to 20 litres. If this is true, it still makes no sense why the individual respondents would make a trip out to Big Bruce if there is a reasonable possibility that a more substantial amount of oil might be needed.

37. The applicant submitted that the trip in the circumstances should have taken about ten minutes, but that a security guard, one Mr May Molekoa who had given evidence at the disciplinary hearing estimated that the time they took was 40 minutes. Mr Molekoa, however, did not give evidence at the arbitration. The applicant said this was because the respondents had said that they would call him as their witness. It appears that Mr Molekoa would have given evidence to the effect that he searched the back of the truck and did not see the sleeve. If this is so it is surprising that the 3rd to 5th respondents did not call him.

38. In any event, according to the 3rd respondent's answering affidavit, confirmed by the 4th respondent, the 4th respondent stated at the arbitration that it took about 30 minutes. The 3rd respondent said, on oath, he agreed with the estimate.

39. The applicant further submitted that 3rd and 4th respondents did not or could not account for the length of time they took. This allegation was not answered by the 3rd and 4th respondent.

40. The applicant's evidence was that the 3rd and 4th respondents took a small amount of the wrong type of oil. The 3rd respondent's response was that he did not know until the arbitration that it was the wrong type of oil. The applicant's mechanical foreman, Isaac Keyser said in evidence that the applicant stopped using the oil that the 3rd respondent took approximately 18 months before the incident.

41. William Baloyi's further evidence was that he locked the gate to Big Bruce and handed it to the foreman, Mat Willemse. He said that both shifts left at 15H30 because it was Friday. The 3rd respondent said the gate was open and he did not take the key with in the event that it was not.

42. The applicant stated that it was unusual to use a tipper truck when an LDV would have been appropriate. For safety reasons it requires that flags be appended to the LDV. The 4th respondent stated that he could not find any. Evidence was presented to the contrary in arbitration that flags were available on 25 October 1996. The respondents

did not deal with the evidence on the availability of flags.

43. Philipus Manamela, an assistance operator, who visited a friend at the Ga Molekane Village on the same day gave the following evidence: he heard a loud bang at approximately 19h00 and also the sound of a truck. He identified the truck by its sound and through sight of the rear of the truck. This identification was made at approximately the time the truck was, it was common cause, outside of the premises. Approximately an hour later MrManamela saw a huge piece of iron silver/grey in colour approximately 1,5 metres x 1 metre lying on it side. When he returned after his shift at 06H00 the following day it was no longer there and there was some oil lying where it had been together with a 200 litre half drum.
44. On 26October1996 an oil drum was found in the workshop with a large C-shaped indentation on it. Tests showed that the eccentric sleeve fitted the indentation. The arbitrator noted this affirmatively as the result of his inspection *in loco* in his award.
45. The sleeve also had paint marks on it which corresponded with the drum which was identified as having been on the tipper truck the night before on 25October1996. Mr Keyser's evidence was that the dented drum had not been there the previous day and that it was Mr Jacob Ledwaba's job to remove the damaged drums from the workshop.
46. The 3rd respondent said he identified one of the two drums used on the night in question. Mr Mashaba's evidence was that he identified both drums. The applicant also states that at the disciplinary hearing the 3rd respondent pointed out both drums. As the applicant reiterates, the 3rd respondent said in answer "*It was Mashaba who told us that the drums pointed out were those which were on the truck*".
47. In addition, Mr Manamela said that prior to the arbitration the 3rd respondent visited him at his residence on two occasions and told him to change his statement suggesting that he should testify that Mr Obed Mashaba, head of security, forced him to make his written statement. The pressure was such that MrManamela launched interdict proceedings in the Magistrates Court for unlawful interference. This evidence was not challenged at all in the arbitration. In his answering affidavit the 3rd respondent said he did challenge it. The challenge is not in evidence.
48. Much is made by the respondents over the evidence of MrMolekoa, the gate guard whose evidence was given at the disciplinary hearing regarding what he saw on the truck and when, but he did not give evidence at the arbitration. The respondents, therefore, submitted that it was incumbent on the applicant to bring him forward. In response the applicant said that the 5th respondent gave notice at the pre-arbitration meeting that they would in fact call Mr Molekoa but did not. The respondents' response to this, which strikes me as absurd, is that because he had already testified at the disciplinary hearing that he did not see the sleeve in the truck there was no necessity to call him. If, as mentioned previously, this evidence was so advantageous it makes no sense not to have called him, after having said he would be called.

The grounds of review

49. The applicant submitted that the arbitrator:

- 49.1 did not apply his mind to the relevant issues in accordance with the behests of the Act;
- 49.2 failed to appreciate and to give effect to his powers and duties in terms of the Act;

- 49.3 adopted an approach unjustified on the facts and inconsistent with his statutory duty;
- 49.4 based his factual conclusion on grounds which do not accurately or correctly reflect the evidence before him;
- 49.5 failed to establish a reasonable correspondence between the evidentiary material placed before him and his award;
- 49.6 failed to establish a proper connection between the evidentiary material reasonably assessed and the legal principles reasonably applied, on the one hand, and the terms of his award, on the other;
- 49.7 misconstrued oral and documentary evidence and ignored or misapplied relevant legal principles to an extent that was unreasonable and inappropriate;
- 49.8 reached conclusions which were not capable of reasonable justification when regard is had to the factual premise upon which they are based.

50. The applicant argued that the grounds for review essentially amount to a submission that the 2nd respondent exceeded his powers in that there is insufficient rational objective basis to justify the connection made by the 2nd respondent between the material properly available to him and the conclusion arrived at. In this respect the applicant referred to the *Carephone* decision at paragraphs 36 and 37 as follows:

"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining the issue is aware that he or she enters into the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, a process will be in order..."

It seems to me that no one will ever be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?"

51. With respect to the misconstruction of the legal test, the applicant argued that although the 2nd respondent recognised that he was bound to apply the civil standard of proof on the balance of probabilities it is clear that he then went on to effectively impose the criminal standard of proof beyond a reasonable doubt. The arbitrator in his reasoning reasoned as follows:

"Although I am mindful of the fact that I am dealing with a labour matter which uses the civil standard of proof on a balance of probabilities, to me, theft is theft. It must be proved by leading clear and convincing evidence. (My emphasis)"

I am not convinced in the circumstances that the employer led clear and convincing evidence to prove that the two grievants were the ones who removed the sleeve mainly because of the following:"

52. He then sets out eight reasons on which he bases such a finding which I shall deal with in due course. He ends the finding by saying:

"Unfortunately, the law is very clear, the case must be proved and if not, wait for another chance."

53. The applicant submits, correctly, that the assessment of circumstantial evidence according to the criminal standard is governed by two rules namely: (1) That the inference sought to be drawn must be consistent with all the proved facts, and (2) that the proved facts should be such that they exclude every reasonable influence from them save the one to be drawn.
54. The applicant then argued that the arbitrator's reasoning contained in his award reflected his application of the higher and inapplicable standard. In terms of the civil standard, it requires that the conclusion sought to be drawn need not be the only reasonable one. It is sufficient if it is the more natural or plausible conclusion from amongst several conceivable ones.
55. The respondents' representative argued that if the inferences are equally possible then the applicant would not have discharged its onus on the balance of probabilities (*Hoffmann & Zeffertt, South African Law of Evidence 4th Edition at 590*). The respondents argued that the 2nd respondent's conclusion is the more plausible conclusion of a variety of possible ones.
56. With respect that the approach adopted of the balance of probabilities being the one consistently followed, the applicant referred to.

Moahlodi v East Rand Gold and Uranium Company Limited (1988)9 ILJ 597 at 601 I – J, and
Louw v Delta Motor Corporation (1996)17 ILJ 958 (IC) at 962I – 963A in reference to the unreported LAC case of *Dion Discount Centre v Rentlo* NH11/2/16821 13 August 1995 at 8.
57. In the recent as yet unreported Labour Court judgement in *Marapula & Others v Consteen (Pty) Ltd*, case no.J1086/98 of 23 April 1999, Jajbhay AJ held at paragraph 33: "[I]n my opinion, the onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version. The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version...".
58. The applicant argued that when an arbitrator has applied the criminal standard of proof instead of the appropriate civil standard in deciding issues in dispute, the arbitrator exceeds his powers. I was referred to the recent case of *Free State Consolidated Gold Mines v BM Jammy and Others*, Labour Court case No.J768/98, dated 19 October 1998, unreported judgment of Acting Judge Brassey.
59. Brassey AJ referred to the case of *Govan v Skidmore* 1952(1)SA732(N) at 734 C-D which held that the selected inference must "by the balancing of probabilities be the more natural, or plausible, conclusion from amongst several conceivable ones" and referred to its approval by the Appellate Division in *AA Onderlinge Assuransie-Assosiasie Beperk v De Beer Ltd* 1982(2) SA 603 A at 614 E – H and in *Ocean Accident & Guarantee Corporation v Koch* 1963 (4) SA 147 (A) at 159 C - D. The applicant also referred to the above authorities in argument.
60. In the *Free State Consolidated* case Brassey AJ found that the arbitrator had applied an inapplicable standard and held that the true question in the case is whether the company had demonstrated that the facts of the case more certainly exhibit the guilt of the individual respondents than not.
61. He held that the principle, in short, is that if a component of the reasoning essential

to the conclusion is vitiated by jurisdictional misdirection, the ultimate conclusion must be flawed as well. I agree.

62. The applicant *in casu* stated that there is no requirement that evidence of theft in disciplinary enquiries and arbitration proceedings should accord to any standard other than the balance of probabilities. It is accordingly inappropriate to require "*clear and convincing evidence*" from an employer to satisfy the requirements of a valid reason for dismissal, as the 2nd respondent did in the present case. There is only one standard of proof – a balance of probabilities.

See: *Gates v Gates* 1939 AD 150 at 155

Santam Bpk v Potgieter 1997(3) SA 415 (O) at 422H – 423A

63. I have already canvassed in some detail the essential evidence that was presented. While it is possible that the 3rd and 4th respondents did not commit the theft, in weighing their evidence against the evidence of the applicant's witnesses, even though circumstantial, the possibility that they did commit the theft in the circumstances is overwhelmingly more plausible.

64. I disagree with the respondents' representative, that the 2nd respondent's conclusion was the more plausible conclusion of a variety of possible ones. Although the 2nd respondent's representative argued that in a civil case if all inferences are equally possible then the balance of probabilities is not discharged, it does not apply in this case. The possibility that they did not commit theft is not equally as plausible in the circumstances as the circumstantial evidence that they did commit theft.

65. The reasons that the arbitrator gave for not being convinced that the employer had led clear and convincing evidence are set out below.

66. "*1. Despite all sorts of threats by Mr Obed Mashaba, the head of security at the mine and by the police at the police station, the grievants stuck to their guns and denied any knowledge of the whereabouts of the sleeve.*"

The applicant submits that at best the fact is a neutral one. The fact that the respondents in a disciplinary hearing and subsequently in arbitration consistently deny knowledge of the whereabouts of the sleeve does not prove anything. It is a denial of the applicant's version that is not an alternative persuasive version.

67. "*2. The company deliberately and conveniently omitted calling the evidence of May Molekoa, the security officer who searched the truck that day when it went out as they knew that his evidence would be that he only saw two drums at the back of the tipper and nothing else.*"

- 67.1 The applicant points out that the statements and evidence of Mr Molekoa taken at the disciplinary hearing were placed before the arbitrator by the applicant. The applicant argued at the arbitration that the negative inference should rather be drawn against the respondents for not having called Mr Molekoa since at the pre-arbitration meeting the 5th respondent indicated that it would in fact be calling him.

- 67.2 The respondents' response was that at the disciplinary hearing the applicant sought to rely on Mr Molekoa's evidence and it was incumbent on the applicant to call this witness and that the failure to do so was correctly criticised by the 2nd respondent. However, the respondents did not deny that they had said that they would call Mr Molekoa as a witness and, as I have mentioned previously, failed to do so because he had already testified at the disciplinary hearing.

- 67.3 Arbitrations conducted by the 1st respondent are *de novo* hearings and therefore

if respondents saw him as a potentially useful witness, which they clearly did by the admission that the 5th respondent said then were going to call Mr Molekoa, it is inexplicable that they did not call him.

67.4 The 2nd respondent's harsh view of the applicant's failure to call Mr Molekoa, in holding that the applicant deliberately failed to call him in the admitted circumstances, borders on a failure to understand the rules of evidence at best and possible bias at worst.

68. "3. *Cable Nyatuli Theledi admitted having given instructions to Doctor Baloyi to attend to the crusher, although he testified that he was referring to the small crusher.*"

68.1 The 2nd respondent appears to overlook the distinction between the two crushers and have regarded this fact as one in favour of the 3rd respondent despite Mr Theledi testifying that he never worked on Big Bruce and could not understand why the 3rd respondent would have construed his instruction to relate to anything other than the small crusher. The applicant argued that the 2nd respondent failed to draw the obvious negative inference against the 3rd respondent, namely, that he had never been under any orders to top up Big Bruce, it was simply an opportunity to legitimately leave the premises.

68.2 The respondents' response to this in their answering affidavit was not implausible in that he referred to his evidence being that because Big Bruce broke down often he assumed Mr Theledi's instructions referred to it. He then goes on to say, however, and this supports the applicant's contention with regard to the drawing of the inference as follows:

"..... Theledi's evidence that his instruction related to the small crusher may well be true but that is not what he said to me nor how I understood the instruction".

68.3 The respondents then go on to say that the 2nd respondent's observation is simply that as an instruction was given regarding the crusher, it is understandable that he did go to a crusher albeit the wrong one as matters turned out to be. On the one hand the 3rd respondent states that he understood the instruction to refer to the big crusher essentially conceding that no specific reference was made to which crusher was at issue but then under oath he states that this is not what Theledi said to him implying that Theledi referred specifically to the big crusher.

69. "4. The two grievants did go to the big crusher."

I agree with the applicant's argument that all this reflects is what the respondents say they did, there is no independent evidence to support this and cannot be treated as more likely than the considerable circumstantial evidence against this.

70. "5. *The two grievants do not reside at the kraal where the sleeve was found and the question is why they would take the sleeve there*".

70.1 The applicant argued that the fact that the respondents do not reside at the kraal is at best a neutral factor and argue that if they were responsible for the theft it would have been foolish to have taken the sleeve to one of their own dwelling places.

70.2 The respondents state that the applicant could offer no explanation why the respondents would take the sleeve to that specific kraal and that it was never suggested that the respondents were in cahoots with attendant of the kraal.

The 2nd respondent took this fact into account in supporting the probability that other persons other than themselves were responsible for the theft. I accept the respondents' submission that it points possibly to others being responsible but, again, with the preponderance of circumstantial evidence against them it lowers the preponderance of that possibility.

71. *"6. David Tsoeleng was there on the evening of 25 October 1996 at the kraal. Why did he not see the hiding of such a big piece of iron? Obviously to dig the kind of trench that was dug to put it in would have taken some hours and a lot of manpower. The witnesses saw nothing and according to Philipus Manamela, at 06h00 the following day the sleeve was gone. Something is not right here."*

David Tsoeleng was not a witness at the arbitration. The applicant stated, therefore, that this improbability was never put to him and it was improper for the arbitrator to level this criticism against the applicant. It appears to me that this point was raised to discredit Mr Manamela's evidence as I discuss below.

72. *"7. Philipus Manamela's evidence was pure speculation and guesswork and I attach very little weight to it."*

- 72.1 This view is not supported by any explanation by the arbitrator or why his evidence should be rejected in light of the fact that the sleeve was indeed found buried at the village. The applicant correctly points out that 2nd respondent failed to take any account of the fact that Manamela's evidence was uncontested. The 2nd respondent appears to have relied on the evidence of David Tsoeleng at the disciplinary enquiry referred to above, to discredit the validity of Mr Manamela's evidence which was unchallenged.

73. The application for condonation is granted in light of the applicant's success on the merits of the claim and the reasons given for the delay.

74. Accordingly the second respondent's award is reviewed and set aside and I declare that the dismissal of the 3rd and 4th respondents by the applicant was substantively fair.

75. However, the 2nd respondent found that the dismissal of the 3rd and 4th respondents was both substantively and procedurally unfair. The issue of the 2nd respondent's finding of procedural unfairness was not raised before me in the application for review. As the award has been set aside in its entirety I make the following order:-

- 75.1 The award of the 2nd respondent is reviewed and set aside.

- 75.2 The dismissal of the 3rd and 4th respondents for the reasons set out in this judgment is substantively fair.

- 75.3 The matter is referred back to the 1st respondent for determination by an arbitrator other than the 2nd respondent to determine the issue of procedural unfairness and to make an award thereon.

- 75.4 The 3rd to 5th respondents are to pay the costs of the application, jointly and severally each paying the other to be absolved.

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S.GON

ACTING JUDGE OF THE LABOUR COURT

Date/s of hearing: 25 March 199

Date of judgment: 29 June 1999

For the applicants: Advocate A I S Redding instructed by Deneys Reitz (Sandton)

For the 3rd to 5th respondents: Mr P Maserumule of Muserumule & Partners.