

NOT REPORTABLE

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: **JR 285/01**

In the matter between:

WESTERN PLATINUM LIMITED

Trading as **KAREE MINE**

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

R I MCGREGOR N.O.

Second Respondent

NDITHA A

Third Respondent

JUDGMENT

NTSEBEZA, AJ:

[1] On the 2nd July 2002, I gave an order reviewing and setting aside an arbitration award dated 17 July 2001 and also remitting the matter to the CCMA for arbitration by another commissioner. The following are the reasons for that award.

[2] I need merely state that I am of the very firm view that I delivered judgment in this matter before I went to the United States at the end of August 2002, to return only in January 2003. A diligent search has not produced any judgment but I still remain convinced that it is one of those that have been the casualty of a heavy load in the administration of four Labour Courts in different cities and the peripatetic nature of

the Judges who sometimes write their judgments from their homes in cities which are not necessarily the ones in which they sat.

- [3] Files are sent all over the country. It is a system that works at the best of times, but it is one in which some judgments are half typed by associates in one city and the remainder in another, and in those circumstances, judgments do go astray, as I am confident this was the case here.
- [4] This review application was unopposed, and, in my experience, one of the more problematic ones for precisely that reason, because a reviewing judge is at the disadvantage of not having the benefit of a contrary argument. It does not really assist to have a deluge of authorities – not that I can ever penalise Mr Snider in this case – when all a judge must do is to play the double role of having to search for authorities that are oppositional and **then** adjudicate on the merits of “both” views.
- [5] It is clear to me that in this case there was no opposition precisely because the Third Respondent, Mr Nditha, is in all probability impecunious and could not afford the funds to hire a legal representative. It is unclear whether he was a member of a union or not, or one that was prepared to assist him.
- [6] Nditha was an employee of Applicant until he was dismissed in October 1999, after he was charged for having been absent without leave (Awol) on the 10th, 16th and 17th September 1999. The matter came before McGregor, an arbitrator who was appointed by the First Respondent (the CCMA) to adjudicate in the dispute between the Mining Company, Applicant (the employer) and Nditha (the employee).

- [7] McGregor found that Nditha had been absent on only one other occasion relevant to an earlier occasion when he had been given a final warning. He held that the employer, through the Appeal Chairperson, failed to consider an “*extended*” final warning for misconduct “*of a less serious nature*”, that led McGregor to conclude that the sanction imposed by the employer was too harsh for the misconduct committed.
- [8] Mr Snider’s attack on McGregor’s award is multi-fold, but right from the start he states that the essence of the award appears to be that the sanction imposed was too harsh for the misconduct committed. I agree with Mr Snider that this is so. He further contends that McGregor appeared to adopt a kind of cavalier approach in his dealing with the hearing. Even for a hearing, the process seems to have been so unorthodox and informal that the net effect was that he deprived himself of the opportunity to fully comprehend **all** the evidence, including documentary evidence, with the result that his conclusions on the facts alone suffer from this approach.
- [9] I agree. Just on the finding that Nditha had been absent on only one other occasion, McGregor is clearly perfunctory in his analysis of the evidence. Nditha had faced no less than eleven allegations of absenteeism up to that point. McGregor may have sought to focus only on the incident on 10 September 1999 and may not have given due regard to the documentary evidence, or even Nditha’s own “*evidence*” such as it was. The further result is that the arbitrator does not make a clear finding as to whether on 10 September 1999, he finds as **a fact** that Nditha was AWOL.
- [10] It is in McGregor’s findings on the harshness of the sanction, or rather his criticism thereof, that one concludes that he did in fact find Nditha to have been absent on 10 September 1999. Where, in view of the approach McGregor adopted, there was

no evidence led that would address the nature of the sanction to be imposed, McGregor's finding that the Appeal Chairperson never considered the relevance of an external warning for misconduct of a "*less serious nature*" was bound to be faulty.

[11] An order of reinstatement effectively reinstating the employee to a period of more than 12 months, the maximum period for which an award can be made was a manifestation of a gross irregularity. I will not recall the cases herein, although I am highly indebted to Mr Snider for, and appreciative of, the effort he put into the research on the legal principles applicable in this.

[12] There is no doubt, on the evidence, that McGregor exceeded his powers. The simple fact of the matter is that if he had properly considered the evidence, he would have found that the only rational basis upon which he could make any finding that determined whether the dismissal was fair, either substantively or procedurally, or in both respects, was when he has applied his mind and has satisfied himself that there is a sound and reasonable connectivity between his conclusion and the evidence before him. Once again Mr Snider droitfully makes use of the authorities to make this point. I cannot fault him in his application of the legal principles to the facts of this case.

[13] In this case, it is not a matter of an arbitrator who comes to a different conclusion than the one to which the court would have come to, but in circumstances where there was no jurisdictional misdirection, in other words, where the arbitrator correctly appreciates his mandate, acts in terms thereof but comes to a different conclusion, that is critical.

[14] Here, McGregor, in my view, failed to apply his mind to the very crucial jurisdictional issue on the analysis of only which he could have arrived at his conclusion, namely, all of the oral and documentary evidence. Over and above that, he misdirected himself as to the remedy he could award to Nditha.

[15] For all these reasons, I concluded as I ordered and I now hand down my reasons relevant to that order. I, however, feel that precisely because of my criticism of McGregor's handling of the hearing, it cannot be said that I am in a position to set aside the award once and for all. Another arbitrator might, in considering properly all the evidence before him or her, come to the same or different conclusion as McGregor. For that reason I ordered the matter to be referred back to the CCMA for hearing before another commissioner.

D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing:

Date of Judgment: