REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 650/10

In the matter between:

BHP BILLITON KLIPSPRUIT COLLIERY	**Applicant**
and	
NUM OBO DLAMINI ALEXANDER	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
LUNGILE MATSHAKA N.O	**Third Respondent**

Heard: 3 November 2011
Delivered: 11 November 2011

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an application to review and set aside an arbitration award made by the third respondent ("the commissioner") on 11 December 2009 in which the dismissal of the first respondent ("Mr Dlamini") was found to be both procedurally and substantively unfair.

[2] Mr Dlamini was found guilty of misconduct on 21 July 2009 following a disciplinary hearing and was dismissed on 4 August 2009. He referred an unfair dismissal dispute to the CCMA which was arbitrated on 24 November 2009. The applicant was represented by its Employee Relations Specialist, Mr Molefe, at the arbitration hearing and Mr Dlamini was represented by an official of NUM, Mr Mabuza. Mr Molefe was based at the applicant's head office and had been an observer at the disciplinary hearing. During the arbitration, neither party called any witnesses or presented evidence under oath. The commissioner found that Mr Dlamini's dismissal was both procedurally and substantively unfair and reinstated him into the same or similar position with the same terms and conditions of employment as previously enjoyed. Mr Dlamini was to resume his duties on 15 January 2010.

Arbitration award

[3] The commissioner found:

> "...the problem lies squarely with the Respondent in proving that the dismissal of the Applicant was fair. This is mainly due to the fact that the Respondent has not brought in a single witness it had relied on when it imposed the dismissal sanction".

[4] The commissioner then concluded that evidence led should be the best evidence and hearsay evidence would only be admissible in exceptional circumstances. He found that the applicant had not discharged the onus to prove that Mr Dlamini's dismissal was procedurally and substantively fair and recorded his difficulty in accepting the applicant's evidence given that it could not be tested for its veracity. The commissioner concluded that Mr Dlamini "is therefore entitled to be reinstated but full reinstatement is denied partly because he is to blame for what led to his dismissal".

Grounds of review

[5] The applicant's grounds of review can be summarised as follows:

5.1 The conclusion reached by the commissioner was not justifiable in relation to the evidence led at the arbitration hearing; and

5.2 The commissioner erred in finding the dismissal substantively and procedurally unfair while finding that Mr Dlamini was "partly to blame for what led to his dismissal" without giving reasons for such finding.

Evaluation

[6] Once a dismissal has been established, the employer must prove that the dismissal is fair in terms of sections 192(2) of the LRA. In determining whether the employer has discharged the onus to prove that the dismissal was fair, the court must select the most probable inference and by "balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one." (Wigmore on Evidence, (3rd ed. para 32). If this favours the employer, on whom the onus rests, then the employer is entitled to an award being made in its favour. If an inference in favour of both parties is equally possible, the onus of proof will not have been discharged and the dismissal, it follows, will not be found to be fair.

[7] Section 138(1) of the LRA permits commissioners in the course of arbitration proceedings to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. In undertaking such task, a commissioner is entitled to 'conduct the arbitration in a manner that the

commissioner considers appropriate in order to determine the dispute fairly and quickly'. Commissioners must however be guided by at least three considerations: the resolution of the real dispute between the parties; as expeditiously as possible; and in a matter which is fair.[1]

[8] An arbitration award stands to be set aside only if the award is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence that may be considered unreasonable[2].

[9] The record of proceedings clearly indicates that no witnesses were sworn in at the hearing of the matter and that the only oral evidence tendered by the applicant was that of Mr Molefe, the applicant's Employee Relations Specialist. This was in spite of the fact that there existed material disputes of fact between the parties relating to the fairness of the dismissal of Mr Dlamini. The applicant, a large multinational company, chose to be represented at the arbitration proceedings by Mr Molefe. It is not the applicant's case that Mr Molefe was unaware as to the manner in which arbitration proceedings before the CCMA are conducted or that he had no experience as to what was required of parties appearing at such proceedings and I am satisfied that, given his position, Mr Molefe could reasonably have been expected to have known what was required in order to present the applicant's case.

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[1] *CUSA v Tao Ying Metal Industries & others* 2009 (1) BCLR 1.

[2] See A Myburgh 'Sidumo v Rusplats: How the Courts deal with it' (2009) 30 ILJ 1

[10] The approach adopted by Mr Molefe was to present the facts of the case himself, without having been sworn in as a witness, apparently on the basis that he had been an observer at the disciplinary hearing and although he did not have direct knowledge of the misconduct alleged to have been committed by Mr Dlamini. He called no further witnesses and at no stage applied for a postponement in order to allow him to do so, even when asked by the commissioner why he did not bring witnesses to testify[3].

[11] This Court is entitled to set aside an arbitration award if the commissioner's decision falls outside of a band of decisions to which a reasonable person could come on the available evidence (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others*).[4] It is accordingly not the correctness of the commissioner's decision which is relevant but whether the result of the arbitration proceedings is reasonable. I find that the decision of the commissioner that the onus of proof had not been discharged was a reasonable one on the basis of the evidence available to him. The applicant cannot fail to present material evidence before a commissioner but come to this Court in review proceedings and claim that the error was that of the commissioner. This is all the more so where the applicant is a multinational company with experience in labour matters. Were this Court to find differently, any applicant could attend at arbitration proceedings, fail to present material evidence relating to the dispute and then claim a

[3] Record page 46 lines 5-7

[4] [2007] 12 BLLR 1097 (CC)

reviewable irregularity on the part of the commissioner in failing to call for such evidence. This would serve only to undermine the current dispute resolution system.

[12]This is not to say that it may, in fact, have been prudent for the commissioner to call for evidence from witnesses with direct knowledge of the alleged misconduct. However, for the reasons canvassed above, I find that his failure to do so does not create a reviewable irregularity which warrants the review and setting aside of the award.

[13] The applicant's further ground of review is that the commissioner erred in finding the dismissal substantively and procedurally unfair while at the same time finding that Mr Dlamini was "partly to blame for what led to his dismissal" without giving reasons for such finding. As a consequence of this finding, the commissioner denied Mr Dlamini full reinstatement. I am not satisfied that this finding was material to the conclusion that the dismissal was procedurally and substantively unfair. Its only effect was to limit full reinstatement for Mr Dlamini, an issue with which he may have elected to take issue but did not. Accordingly, the award does not justify being reviewed and set aside on this basis.

[14]In the circumstances, I find that the conclusion reached by the commissioner was justifiable in relation to the evidence before him and that the arbitration award does not fall outside of a band of decisions to which a

reasonable person could come on the available evidence. The application to review and set aside the arbitration award accordingly must fail.

Costs

[15] The court has a broad discretion, set out in section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. The fact that the applicant has not been successful in this application militates in favour of a costs order in favour of the first respondent. There are no reasons before me to suggest why costs should not follow the result.

Order

Accordingly, I make the following order:

[16] The application to review and set aside the arbitration award issued under CCMA case number MP6877/09 is dismissed with costs.

K M Savage
Acting Judge

APPEARANCES:

APPLICANT: J A Raubenheimer

THIRD RESPONDENT: L Malan
Instructed by Finger Phukubje Inc, Johannesburg.

REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1180/08

In the matter between:

IEMAS (CO-OPERATIVE) LIMITED	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER D NKADIMENG	**Second Respondent**
NUM obo A ROUX	**Third Respondent**

Heard: **27 October 2011**

Delivered: **10 November 2011**

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent ("the commissioner") on 29 April 2008 in which the

dismissal of the third respondent ("Ms Roux") was found to be both procedurally and substantively unfair.

[2] Ms Roux was employed by the applicant in the position of asset-based financing sales consultant at the time of her dismissal on 12 December 2007. She had been employed for approximately 12 years and was dismissed following having been found guilty of:

'Non-compliance with the quality of service requirements of Iemas' code of conduct (par 9.3) in that you on 23 October 2007, behaved unprofessionally and disrespectfully towards a business partner, Mr Don Emslie of Emslie Motors.'

Paragraph 9.3 of the code of conduct states the following:

'Members, colleagues and business partners are at all times handled courteously, professionally and with the greatest respect, regardless of the behaviour of the member, colleague or business partner. An injustice to a member, colleague or business partner is viewed as an injustice to Iemas and will be dealt with as such'

[3] Ms Roux lodged an appeal against her dismissal but did not attend the appeal hearing. The appeal was concluded in her absence and her dismissal was upheld.

Arbitration award

[4] The commissioner dismissed an application for legal representation made at the arbitration hearing. In his ruling the commissioner detailed the grounds on which the company sought legal representation and concluded that he was not persuaded that it would be unreasonable, considering CCMA rule 25, to disallow legal representation.

[5] In the award, the commissioner sets out a summary of the evidence of five witnesses three of whom, testified for the applicant and two for Ms Roux.

[6] The commissioner concluded that the applicant had not discharged the onus to prove the employee's alleged offensive conduct and that Ms Roux was not dismissed for a fair reason within the meaning of section 188 of the Labour

Relations Act.[1] The dismissal was found to be procedurally unfair in that the chairperson refused to hear the testimony of the employee's witness. Ms Roux was awarded compensation equivalent to eight months' salary given that she did not seek reinstatement.

Review test

[7] An arbitrator when considering a dismissal for misconduct, is required to determine whether the misconduct alleged has been shown on a balance of probabilities to exist. Section 138 (1) of the LRA permits commissioners to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. In undertaking their task, a commissioner is entitled to 'conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly'. Commissioners must be guided by at least three considerations: the resolution of the real dispute between the parties; as expeditiously as possible; and in a manner which is fair.[2]

[8] This Court, with reference to the grounds of review is entitled to set aside an arbitration award if the commissioner's decision falls outside of a band of decisions to which a reasonable person could come on the available evidence (see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others).*[3] It is accordingly not the correctness of the commissioner's decision which is relevant but whether the result of the arbitration proceedings is reasonable.

[9] In *Bestel v Astral Operations Ltd and Others,*[4] Davis JA emphasised:

'...that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected'.

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[1] 66 of 1995.
[2] *CUSA v Tao Ying Metal Industries and Others* 2009 (1) BCLR 1.
[3] [2007] 12 BLLR 1097 (CC).
[4] [2011] 2 BLLR 129 (LAC) at para 18.

[10] The test in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent one that will ensure that awards are not lightly interfered with.[5]

[11] It follows therefore that it is only an award that is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence that may be considered unreasonable[6].

Grounds of review

[12] The applicant has raised a number of grounds of review in this application:

12.1 In making his ruling not to allow legal representation, the commissioner failed to apply his mind properly to the application and failed to give proper reasons for his decision;

12.2 The commissioner misconducted himself and/or committed a gross irregularity and/or exceeded his powers in the course of the arbitration proceedings in that he misconstrued relevant questions of law and fact in such proceedings by:

12.2.1 allowing the respondent to venture beyond the issues contained in the pre-arbitration minute (a ground which was not pursed at the hearing of the matter);

12.2.2 finding that Mr Emslie 'admitted' that he swore at Ms Roux when this was not the evidence of Mr Emslie;

12.2.3 failing to advise a lay person in respect of issues such as leading evidence and conducting cross-examination and failing to draw an adverse inference from the fact that the witnesses called by the respondent never put their versions to the applicant's witnesses and accordingly there was no opportunity given to answer to the respondent's version;

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[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* at para100.
[6] See A Myburgh 'Sidumo v Rusplats: How the Courts deal with it' (2009) 30 *ILJ* 1.

12.2.4 making a subjective finding in para 6.23 of his award relating to the motive for the dismissal which was not supported by evidence and was largely speculative;

12.2.5 finding that Ms Geyer had done everything in her power to prevent Ms Roux's witness from testifying, which was irrational and without any foundation when Ms Roux was not prevented from calling her witness and this issue was not put to Ms Geyer in cross-examination; and

12.2.6 Ms Roux abandoned her opportunity to appeal the finding, at which appeal any procedural or substantive irregularity.

Evaluation

[13] The third respondent submitted that the record filed was inadequate given that there were many inaudible parts which were incapable of transcription and that no reconstruction of the record had been undertaken. A record of proceedings is rarely a perfect image of all aspects of an arbitration hearing. What is required is that a record filed fairly and sufficiently reflects the relevant aspects of the evidence presented at the arbitration proceedings so as to place the court in a position that allows a review exercise to be undertaken. In addition to the transcript prepared, the commissioner's notes have been availed to this Court, as has additional documentary evidence relevant to the matter. I am satisfied therefore that, cognisant of the fact that there may be imperfections, the record filed in this matter allows this Court to perform its functions in terms of section 145 and is therefore adequate for the current purposes.

[14] The first ground of review raised by the applicant relates to the decision made by the commissioner to disallow legal representation at the arbitration hearing. In his written ruling on legal representation, the commissioner detailed the arguments of the parties, referred to rule 25 of the CCMA's rules and concluded that the dispute concerned misconduct and that he was not persuaded that it would be unreasonable to disallow legal representation. The

transcript of proceedings bears testimony to the commissioner's reasoning in this regard.

[15] The provisions of rule 25 are mandatory: parties to arbitration hearings may not be represented by a legal practitioner where the dispute being arbitrated concerns an employee's dismissal for alleged misconduct or incapacity. An application for legal representation may only be granted where the commissioner and all parties consent, or where the commissioner concludes that the nature of the questions of law raised in the dispute, the complexity of the dispute, the public interest and the comparative ability of the parties and/or their representatives to deal with the dispute justifies such a ruling.

[16] The applicant did not present the commissioner with an argument that there were questions of law raised in the dispute which justified legal representation or that the public interest required such representation. The application was founded rather on argument alone regarding the alleged complexity of the dispute and the comparative ability of the parties to deal with the dispute. In any application for legal representation, the applicant must make out a proper case in accordance with the provisions of rule 25. The grant of legal representation in misconduct and incapacity dismissals is not one just for the taking. What is required is that the appropriate facts be placed before a commissioner in support of such application. Consequently, the conclusion reached by the commissioner to disallow legal representation was not unreasonable in the face only of argument that a human resources manager lacks the experience and expertise required to represent the employer when compared to the union representative. No evidence was placed before the commissioner to justify the applicant's submission that the representatives were not comparatively able to represent the parties in the matter and the applicant took no steps to prove that this was indeed so. Furthermore, having studied the record and the commissioner's ruling, I am not persuaded that the applicant made out a case which proved that the matter was of a complexity which warranted legal representation. In the circumstances, the ruling was not an unreasonable one and was justified on the basis of the material placed before the commissioner.

[17] The applicant raises as a further ground of review that the commissioner misconstrued relevant questions of law and fact during the arbitration proceedings. It is the applicant's case that the commissioner found that Mr Emslie had 'admitted' that he swore at Ms Roux when this was not the evidence of Mr Emslie during the arbitration hearing. The evidence of Mr Emslie at the arbitration hearing was that when he had put down the phone he was looking at his salesman and told him 'well, fok dit, kry my haar baas se nommer'. He testified that he was 'never swearing at her'[7]. The commissioner recorded the evidence of Mr Emslie to be '(w)hen he put down the receiver, he said "Fok dit", not to the applicant but to his foreman who was standing close to him'[8]. It was Mr Reynders whose evidence is recorded by the commissioner as having been that Mr Emslie admitted that he swore at Ms Roux. The commissioner did not conclude that Mr Emslie swore at Ms Roux but rather that Mr Emslie admitted using the words "Fok dit" even though he denied that the words were addressed to Ms Roux[9]. The commissioner then found that '[c]oupled with Emslie's admission that he used the words "Fok dit", my finding is that Emslie was extremely rude to the applicant during their telephone discussion on 24 October 2007'[10]. I am therefore satisfied that the commissioner did not misconstrue the evidence before him in arriving at the finding that he did. The commissioner did not conclude that Mr Emslie had admitted that he had sworn at Ms Roux. The conclusions reached by the commissioner on this aspect are accordingly reasonable and justified based on the evidence before him.

[18] The next review ground relates to the observation of the commissioner that:

'Emslie commanded respect in the close-knit community of Lephalale because of his large business interests. Reynders expressed fear of losing Emslie's business to the competition. In my view, this fear played a role in the dismissal of the applicant. In the manner of speaking, the respondent chose the lesser of two evils'[11].

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[7] Transcript page 83 lines 1-2.
[8] Arbitration award page 19 at para 4.2.10.
[9] Arbitration award, page 24 at para 6.13.
[10] Arbitration award, page 26 at para 6.28.
[11] Arbitration award, page 25 at para 6.23.

[19] The commissioner's observations are not contradicted by the record, nor by the probabilities. Mr Emslie was an important client of the applicant and this is borne out from the record. The applicant took the complaint made against Ms Roux seriously. This is recorded in an email sent by Mr Reynders and is evident from his testimony that a good relationship with the dealers in town is very important and that after receiving the complaint, he went to see the dealer personally in the interests of building a successful business. He testified in answer to a question regarding the decision to take disciplinary action against Ms Roux that he was very annoyed with what the dealer had told him and that Mr Emslie had said he would 'cancel your business' and that he would advertise in the newspaper 'that is the way you are doing business'[12]. Mr Reynders thereafter indicated that he was to investigate the matter and stated 'from there I am going to take it further. And I think on that moment [in] time I realise that I had to go further with the disciplinary hearing'[13]. Mr Reynders testified under cross-examination that 'if we don't attend to this problem he is going to ...advertise to the public that this is the type of service he got from IEMAS'.[14] Having considered the evidence placed before the commissioner on this point, I find that the conclusion reached regarding the decision to discipline Ms Roux and the fact that fear with regards to losing business played into the decision to dismiss her, to be a reasonable one based on his assessment of the evidence before him. I do not find that this was 'wholly subjective, not supported by the evidence and largely speculative'.

[20] The applicant's next ground of review is that the applicant claims that the commissioner failed to guide and advise Ms Geyer as a lay person in conducting the case for the company *inter alia* with regards to the leading of witnesses and cross-examination. Section 138(1) of the LRA provides that a:

'commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'.

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[12] Transcript, page 60 line 18.
[13] Transcript, page 61 lines 1-3.
[14] Transcript page 69 lines 7-14.

The commissioner is accordingly afforded a discretion as to the manner in which the arbitration proceedings are conducted provided that the interest of justice and fairness are not compromised. It is apparent from the record that the commissioner did take steps to give assistance to the parties at the outset of the hearing[15]. The commissioner clarified the approach to documentary evidence[16] and to the fact that he was to determine whether the dismissal was correct and whether it was an appropriate sanction[17]. Both parties were provided with an adequate opportunity to present their respective cases, present evidence and cross-examine witnesses and the records bears this out. In performing his functions, the commissioner did not fail to resolve the real dispute between the parties, as expeditiously as possible and in a manner which is fair.[18] From the record there is no basis to support a conclusion that the commissioner did not act fairly in the manner he conducted proceedings.

[21] The applicant suggests the commissioner failed to draw an adverse inference from the fact that the version of Ms Roux's witnesses was not put to the applicant's witnesses who therefore had no opportunity to answer to such version. Ms Roux's representative did canvass with Mr Reynders under cross-examination whether he had heard the conversation and how he came to the conclusion that Ms Roux was unprofessional (and disrespectful). His response was that Mr Emslie had told him.[19] Mr Emslie's evidence that the conversation with Ms Roux was 'katterig snedig byterig' was not challenged under cross-examination by Ms Roux. What the commissioner's notes record is that what was put to Mr Emslie was whether he could prove that the conversation was unprofessional and rude. His response was that he could and that there are ethics that must be followed and that he received his money after complaining. It was then put to Mr Emslie that he 'uttered the words but she can't prove it'. He denied this. Mr Emslie was also asked in cross-examination if Ms Roux had provoked him and he said that she had. It was Ms Roux's case that she tried to calm Mr Emslie down and that he had sworn at her.

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[15] Page 42 lines 9-10.
[16] Pages 44-45.
[17] Page 46 lines 19–23.
[18] *CUSA v Tao Ying Metal Industries & others* 2009 (1) BCLR 1.
[19] Transcript, page 70 at lines 18-20.

[22] I am satisfied that that all three of the applicant's witnesses were provided with an adequate opportunity in cross-examination to answer to the nub of Ms Roux's case. Having due regard to the facts and circumstances in this case, I am therefore satisfied that no reviewable irregularity arose by virtue of a failure to put a version to the applicant's witnesses in cross-examination.

[23] The commissioner was faced with two versions: that of the applicant that Ms Roux was 'katterig snedig byterig' but that Mr Emslie on his own admission swore (not at Ms Roux) as he put the telephone down; and the second being that of Ms Roux that Mr Emslie was rude, even to Ms Mabelebele, and that Ms Roux had tried to keep calm, stating that the conversation was being recorded.[20] Where there exists a factual dispute (see *SFW Group Ltd and Another v Martell et CIE and Others*[21] 2003 (1) SA 11 (SCA) per Nienaber JA) :

'...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' 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, (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 about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she 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 the 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.'[22]

[24] The commissioner's prime function was to determine the truth from the conflicting versions before him and in doing so to make some attempt to assess

[20] Transcript, page 108 at line 16.
[21] 2003 (1) SA 11 (SCA).
[22] Op at para 5.

the credibility of the witnesses by reference to any internal and external inconsistencies that might exist, to assess their reliability and to consider the probability or improbability of each party's version. (See *Isaacs v Education Labour Relations Council* (unreported) C460/2008).

[25] The commissioner's finding that the onus to prove Ms Roux's alleged offensive conduct on a balance of probabilities had not been discharged, was one made primarily on a credibility finding made against the applicant and its witnesses and an acceptance of the inherent probability of Ms Roux's version. This is apparent from the commissioner's evaluation of the evidence before him. The commissioner's conclusion that Mr Emslie had been rude to Ms Mabelebele and had used foul language led him to conclude that it was not difficult to believe that he would also have been rude to Ms Roux. This finding is one that is justified on the evidence before him and is not unreasonable in the circumstances. The additional findings of the commissioner indicate an attempt to assess the credibility of the witnesses by reference to the facts and circumstances before him, to assess their reliability and to consider the probability or improbability of each party's version.

[26] A review court should not interfere with a credibility finding given that the court, unlike the commissioner, lacks the advantage of first-hand observation of the witnesses and their demeanour, and where there is no apparent basis from the record to justify calling a commissioner's finding into question. (See *Isaacs v Education Labour Relations Council* (unreported) C460/2008 at para 24)

[27] As stated previously, it is not the correctness of the commissioner's decision that this Court must decide on review. In finding the dismissal of the applicant to be substantively unfair, I find that the result falls within the band of reasonable decisions which stood to be made by the commissioner based on the evidence before him and that there exists no basis on which to interfere with such decision.

[28] The last two grounds of review raised by the applicant relate in the first instance to the finding of procedural unfairness made against the applicant by virtue of the fact that Ms Roux was not permitted to call Ms Mabelebele as a witness at the disciplinary hearing; and secondly to the fact that Ms Roux failed

to attend the appeal hearing at which, the applicant contends, any procedural or substantive unfairness could have been remedied. The chairperson did not hear the testimony of Ms Mabelebele at the disciplinary hearing. The commissioner recorded in the arbitration award that the chairperson's stated reasons for disallowing the evidence as being that: it was for Ms Roux to ensure that her witnesses attended the hearing, if Ms Mabelebele was telephoned the whole process would start over again and that her evidence was only about what was said to her by Ms Roux and not about what was said to Ms Roux. The commissioner concluded that all three reasons were open to criticism. These criticisms were that in terms of the notice, the Secretary of the disciplinary hearing was to ensure the attendance of the witnesses; it was difficult to see how the whole hearing would have to start again if Ms Mabelebele testified; and it was incorrect that her evidence was only about what she heard from the applicant but would probably have influenced the outcome of the hearing. The commissioner concluded that '(o)verwhemingly, the evidence showed that Ms Geyer was doing everything in her power to stop Girly from testifying at the disciplinary hearing, and the chairperson was wrong in excluding Girly's evidence'. He found that the dismissal was procedurally unfair in that Ms Mabelebele was prevented from testifying.

[29] The disciplinary hearing notice stated that Ms Roux was to inform her witnesses to be present at the hearing and '(t)he Secretary will make arrangements for their presence during the hearing'. In terms of the disciplinary hearing notice, Ms Geyer was to ensure the attendance of witnesses. The minutes of the hearing record that Ms Roux indicated her intention to call Ms Mabelebele as a witness and requested at the hearing that Ms Mabelebele be allowed to testify over the phone given that it was Ms Geyer's role as the Secretary to ensure Ms Mabelebele was at the hearing. The chairperson refused this request and ruled that it was Ms Roux's responsibility to call witnesses and that she had had two opportunities to contact witnesses during the hearing. Ms Roux then asked 'for permission to phone Ms Mabelebele to hear if she could come in and testify'. The chair responded that if this was allowed, the process would have to start again and the witnesses had left already and could not be cross-examined. In the circumstances, it is clear that Ms Roux was not given the appropriate opportunity to call Ms Mabelebele as

her witness at the disciplinary hearing. I find there to be nothing unreasonable in the commissioner's conclusion that a procedural unfairness was accordingly committed in this regard. Furthermore, the commissioner's conclusion that Ms Mabelebele's evidence may have influenced the outcome of the disciplinary hearing, was clearly reasonable given the evidence before him.

[30] The last review relating to Ms Roux's failure to attend the appeal hearing does not appear to have been raised in these terms during the arbitration hearing, although reference was made in evidence to the failure to attend the appeal. The commissioner, during the course of proceedings, did not consider the issue to be relevant. For purposes of these proceedings, the applicant, despite Ms Roux's failure to attend, had the opportunity to revisit the decision made at the disciplinary hearing and arrive at a different decision on appeal had it seen fit to do so. It did not. The applicant has accordingly provided no substantive justification to this Court to take this ground of review any further.

[31] In conclusion, I find that the commissioner did not misconstrue relevant questions of law and fact during the course of the arbitration proceedings. There is nothing before this Court which indicates that the commissioner committed misconduct in relation to his duties as an arbitrator, nor did he commit a gross irregularity in the conduct of proceedings or exceed his powers. The findings of the commissioner fell within a band of decisions to which a reasonable person could come on the available evidence. On a consideration of the grounds of review raised by the applicant, this Court finds that the application to review and set aside the arbitration award must fail.

Costs

[32] The Court has a broad discretion, established by section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. The fact that the applicant has not been successful in this application militates in favour of a costs order in favour of the third respondent. There are no reasons before me to suggest why costs in this matter should not follow the result.

Order

Accordingly, I make the following order:

[33] The application is dismissed with costs.

K M Savage

Acting Judge

APPEARANCES

APPLICANT: B Roode

THIRD RESPONDENT: L Malan

Instructed by Finger Phukubje Inc, Johannesburg.

CCMA

ARBITRATION AWARD

Case Number: *LP7187-10*
Commissioner: *Michael Lati Mashego*
Date of Award: *19-Oct-2011*

In the **ARBITRATION** between

Velapi Amos Matlakeng
(Union/Applicant)

and

Cash Paymaster Service (Pty) Ltd
(Respondent)

Union/Employee's representative: *Mr. P. Phukubje (Attorney)*
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DETAILS OF ARBITRATION AND HEARING

[1] The Arbitration was finalised at the CCMA Polokwane on the 29th September 2011. The parties agreed to file closing arguments on or before the 06th October 2011. The employer was representing Ms M.C McDonald from the Company. The employee was represented by Mr. Phukubye an Attorney from Johannesburg.

THE ISSUE TO BE DECIDED

[2] The issue is whether the dismissal of the employee was substantively fair or not. Procedure was placed out of issue.

BACKGROUND TO THE ISSUE

[3] The employer admitted dismissing the employee for allegedly deleting certain data from its computer system/ as a result the employer could not account to SASSA. The consequence was that the company suffered financial loss. The employer relied on the outcome of a polygraph test which the employee had failed. The employer further relied on the fact that only the employee and one Riaan could operate the system. On the other hand the employee denied the misconduct and averred that Riaan, a colleague of his is the one who was working on the data the day it went missing.

SURVEY OF EVIDENCE AND ARGUMENT

Mr. WALTER LOURIE CHALMERS testified under oath that:

[4] He is the group's HR Manager. He chaired the disciplinary hearing. Page 43 of the employer's bundle contains his findings. He found the employee guilty of the transgression of paragraphs 4.4.1, 4.4.14 and 4.4.19 of the company's disciplinary code and procedure. It was only the employee and Riaan who could work on the computer system of the company at Thohoyandou. He was with the company for a number of years and it has never happened that data be deleted in this manner. This is information which the company uses to reconcile its records with the Government. A polygraph test was used to sniff out the culprit. It was not the only evidence, the other evidence is that:

- data went missing and,
- only two people knew how to work on the computer system.

[5] At the end of the day it could be said, that the polygraph was the determining factor because one passed (Riaan) and the other (the employee) failed. It was a condition of employment that where the need arises the employees will undergo polygraph tests.

LIZETTE SNYMAN testified under oath as follows:

[6] She is the polygraph examiner who tested the employee. She has been conducting polygraph tests for three years. She has done approximately 1700 tests for various companies. She did her first training with an American company called ASIT. She did one year internship; thereafter she did two advanced training courses with another American University called AIIP. Both universities are accredited. She is also registered with the South African Polygraph Association (SAPA). AIIP is headed by one Chuck Splapsky and ASIT by Nait Gordon. Before conducting the test she meets with the client (employer). They decide on the questions to be asked during the test. Thereafter the interviewee comes in. she does the compulsory forensic interview. She gets personal information from the interviewee, thereafter she reveals the questions to be asked during the test. The interviewee must understand the purpose of the test and also state his side of the story and reveal if he suspects anyone. Thereafter he is put on a chair and the components of the polygraph machine are attached to him. She then demonstrates to the interviewee how to conduct himself, not to move etc, and to answer yes or no. the components are:

- Electro dermal activity (sweat level
- The breathing component
- The heart and blood pressure component.

[7] Page 61 of bundle "A" are the questions she asked the employee. Some of the questions are irrelevant but important because they give the tracing average (physical reaction). The relevant question she asked on page 61 is R04, R06, R08 and R10. On all four she found that the employee was deceptive. The employee failed the polygraph test, he even had a - 9 which is a huge fail. Riaan was also tested, he passed the entire polygraph test. The polygraph has the accuracy of 98% which makes it the highest reliable lie detector test in the world.

Mr. RIAAN GERBER testified under oath that:

[8] He is a Support Supervisor at Thohoyandou. He started in January 2010. The Supervisor and the Branch Manager have authority over their files. The computer system they use is Dos 6.22 and Windows 3.11. The Branch Manager did have access to the system but did not know how to work on it

because he was still new. It was only him and the employee who had known now. He worked on the data the day the information got lost; it was the 08th October 2010. He sent information to head office. The following day Godfrey from head office told him that the information was not all there and it reflected that only two pensioners were paid. He had to wait for the team to come back from the field. When the team got back all the files of the 08th October 2010 were not on the system anymore. Every information before and after the 08th was there. Even the two files Godfrey spoke about were no longer there.

[9] On each workstation there is a back up. The back up for the 08th was not there. This kind of loss never happened before. It is not easy to delete information by mistake because the computer asks you if you are sure that you want to delete. The tally rolls were also never found. The tally rolls contained the same information that was missing. Most of the staff did not like their manager but he got along well with him. The tally rolls are the physical back up. In this case they could not be used because they were also missing. He has been with the company for 14 years and he only used tally rolls twice.

Mr. FRANCHOIS LABUSCHAGNE testified under oath that:

[10] He has worked for the company for about 15 years. He is the Branch Manager in Louis Trichadt. Prior to that he was stationed in Thohoyandou. Their whole operation is based on trust because they work with cash. It is important that they should trust their employees. After the loss of the data and the tally rolls he went to Thohoyandou to verify the loss. He checked for the information, it was gone. He once worked in Thohoyandou and knows the computer systems there. He was once a supervisor. The system is Dos and it is based on Windows 1. It is an old system. It is not easy to delete data. If you press delete it asks you if you indeed want to delete.

[11] In his career with the company it never happened that he lost information. The only time it occurred was when the vehicle burnt down. All the information for that day was missing; he can't recall what day it was. They need the information to invoice SASSA. Without it they cannot. The company has accordingly suffered a loss. In his opinion the trust between the employee and the company has irretrievably broken down. It is only the supervisors who would know which file to delete. He knew the system because he once worked there but the current Branch Manager did not know the system.

[12] Page 30 of bundle "A" is the Articles of Agreement the employee signed. Item 3.5 demands utmost good faith from him. The contract between them and SASSA is currently extended till March next year. They have tendered for another contract but are not sure whether they will get it because other companies

have tendered as well. On page 42 the employee signed to confirm that he understands the policies and the procedure manuals of the company.

VELAPHI AMOS MATLAKENG the employee testified under oath that:

[13] He joined the company on the 01st of April 2005. He was the Technical Support Supervisor. On the 08th November 2010 he was on duty till 17h00 when he knocked off. The next day he got to work at 10h00. On the 08th he was out in the field but as the team was running smoothly the Branch Manager called him back to the branch. He did go but knocked off even before the team could return. Riaan is the one who did the close up. He is the one who sent the information to Godfrey. He did not know anything till the 12th when the Branch Manager called him and told him that Godfrey wanted information. He instructed that the information should be found and be sent through to Godfrey at head office.

[14] He searched for the information and did not find it. He asked Riaan for it as he is the one who was working on it on the 08th. He searched even in the vehicle they were using. He searched in the computer, the information was not there. They also searched for the tally rolls, nothing was found. Riaan was not there when everybody in the office was searching despite that the Branch Manager had said no one must leave before the information is found. Riaan did not tell him that the information was missing till the Branch Manager told him on the 12th. He denies deleting the information. He has no reason to do it. A lot of the staff at the branch did not like the Branch Manager. They even lodged a grievance. Lourie Chalmers came to solve it. But, he (Matlakeng) did not have a problem with the Branch Manager.

[15] When a team comes back from the field the Senior Operator gives the tally rolls to the Branch Clerk, the latter must put them in an envelope, seal it and put it in a storeroom. The Branch Manager must always make sure that the storeroom is locked. Page 44 is the tally roll register; it was done by one Tsietso. She has since been dismissed for the missing tally rolls. The Branch Manager was also dismissed for failing to lock the storeroom. He did go to the lie detector test in Louis Trichadt after the Branch Manager told him to.

ANALYSIS OF EVIDENCE AND ARGUMENT

[16] The employee was charged as follows:

"You will be required to answer the following charges at the enquiry;

1. **Dishonesty** (which includes but is not limited to theft, bribery, fraud, forgery or defalcation of any nature, the unauthorized removal of any material from the company, or from any person or premises where such material is kept, failure to report any dishonesty by a fellow employee/supervisor) (Paragraph 4.4.1 of the Disciplinary Code and Procedure) **in that it is alleged that:**

1.1 You removed and/or assisted in the removal of Tally Rolls for payment Workstation A of the Mutale Payment Team for payment on 08th November 2010 and/or;

1.2 You removed and/or deleted the electronic file backups for the Mutale Payment team's payments made on the 08th November 2010 from the internal and external hard drives.

And/or

2. Sabotage (any intentional or malicious act to interfere with the records and/or assets of the company. (Paragraph 4.4.14 of the Disciplinary Code and Procedure) **in that it is alleged that;**

2.1 You intentionally removed and/or assisted in the removal of the Tally Rolls for payment Workstation A of the Mutale Payment Team for payments made on the 08th November 2010 and/or;

2.2 You deliberately removed and/or deleted the electronic file backups for payments made on the 08th November 2010 from the internal and external hard drives for the Mutale Payment Team.

And/or

3. Damage or loss suffered by the company through the disregard of its rules and procedures. (Paragraph 4.4.19 of the Disciplinary Code and Procedure) **in that it is alleged that:**

3.1 The company suffered a loss of Tally Rolls for Payment Workstation A of the Mutale Payment on the 08th November 2010 and/or;

3.2 The company suffered a financial loss in that employees were required to work overtime whilst attempting to recover the Tally Rolls and the electronic file backups for Payment Workstation A of the Mutale Payment Team for payments made on the 08th November 2010.

[17] It is settled law that the negative outcome of a polygraph test on its own is not enough to found a conviction. If there is evidence *in aliunde* to corroborate the negative outcome a finding of guilt will be sustainable.

Vide: **Foods & Allied Workers Union obo Kapesi & others v Premier Foods (2010) 31 ILJ 1654** (LC)

[18] It is common cause *in casu* that the employee failed the polygraph test. In her opening address Ms McDonald stated that the employer was not only relying on the polygraph test but there was also other evidence to corroborate it. The "other" evidence which she alluded to in her opening statement was that the employee admitted that only he and Riaan could work on the system. Furthermore she relied on the evidence of four witnesses. Of the four a witness who testified that there was evidence *in aliunde* is the chairperson of the disciplinary hearing M. Chalmers. The other witness, Ms Snyman testified on her qualifications, how she conducted the polygraph test, the reliability thereof and the outcome.

[19] As far as the "other evidence" is concerned Riaan and Mr. Labuschagne were not helpful. It is common cause that the employee admits that the information got lost. That admission does not prove that he is guilty of the misconduct; it can be therefore not be viewed as corroborating the outcome of the polygraph test. As far as Mr. Chalmers is concerned, he testified that there was "other evidence" in that:

- Data got missing and,
- Only two people could work on the system.

[20] These are known facts which do not take the matter further, anyway even before cross examination Mr. Chalmers himself stated in his evidence in chief that at the end of the day it is the polygraph test that is the determining factor because Riaan passed and the employee failed. The fact that the employee failed certainly makes a person suspicious but that alone cannot even on a balance of probabilities found a finding of guilt. **Justice Basson in FAWU obo Kapesi v Premier Foods** supra held that:

"At best a polygraph can be used as part of an investigation process whether further investigation into the conduct of a particular individual is warranted". Coincidentally this is what Ms Snyman recommended in he conclusion on page 62 of bundle "A".

[21] In fact if the polygraph was conclusive she would not recommend further investigation. The principle concerning polygraphs is clearly known to Ms McDonald because in her own closing arguments she

refers to **Govender and Chetty v Cargo and Container Services KN 4881**, wherein it was stated that the polygraph can only strengthen other evidence. There is none in this case. Ms McDonald argued that the employee denied that there was bad blood between him and the Branch Manager and that should be seen as extraneous evidence which the polygraph should strengthen. Employee did not deny this, he said that the staff had a problem with the Branch Manager but Mr. Chalmers came to solve that problem.

[22] He said further that he personally did not have a problem with the Branch Manager. I have not found any sustainable evidence to disbelieve him, even if it were to be found that he did have a problem with the Branch Manager, to conclude that because he had a problem with the Branch Manager, he deleted the information so that the company must suffer a loss and thereafter decide to charge him and probably get rid of him is a chain of dangerous speculation which may lead to gross injustice. I find that the employer has failed to justify the dismissal. It was substantively unfair. Mr. Phukubye prayed for compensation informed by the evidence of the employer's witnesses that they did not trust the employee anymore.

AWARD

1. The employer is ordered to pay the employee in the sum of **R124 586.00** (calculated as follows: **R11 326** monthly salary at the time of the dismissal x 11 months) being the equivalence of remuneration from the date of the dismissal up to the date of the award.

2. The primary remedy of a reinstatement with full back pay would have been appropriate under the circumstances but the employee himself through his Attorney prayed for compensation calculated from the date of the dismissal to the date of the award.

3. I find that the compensation prayed for is fair and equitable.

CCMA COMMISSIONER: [M. L. Mashego]

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AND TO:	**FINGER PHUKUBJE ATTORNEYS**
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AND TO:	**EVERSHEDS**
ATT:	**MR I MAHOMED**
FAX NO:	**086 678 7673**
DATE:	**6 SEPTEMBER 2011**
SUBJECT:	**NUM obo K A MOKOENA / THE COMMISSIONER FOR CONCILIATION MEDIATION AND ARBITRATION & ORS, CASE NO: JR 2678/08**
MESSAGE:	Attached please find written judgment in respect of third respondent's application for leave to appeal: 6 September 2011.

NORMAN ARENDSE SC

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR2678/08

In the matter between:

NATIONAL UNION OF MINEWORKS	First Applicant
MOKOENA, K A	Second Applicant
and	
THE COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
LUNGI LUCWABA N.O.	Second Respondent
EZULWINI MINING COMPANY (PTY) LTD	Third Respondent

WRITTEN JUDGMENT IN RESPECT OF THIRD RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL: 6 SEPTEMBER 2011

ARENDSE AJ

1. I furnished written reasons on **1 October 2010** in respect of an order I gave on **21 July 2009** that:

1.1 the arbitration award dated **13 October 2008** is reviewed, and set aside;

1.2 the conduct of the third respondent in not appointing the second applicant amounts to an unfair labour practice;

1.3 the third respondent is to appoint the second applicant to his position retrospectively; and

1.4 the third respondent is to pay the applicants' costs.

2. Prior to me furnishing written reasons on **1 October 2010** but subsequent to the order of **21 July 2009**, the third respondent served its notice of application for leave to appeal in terms of s 166(1) of the Labour Relations Act, 1995 (*"the LRA"*) read with Rule 30 of the Rules of the Labour Court of South Africa, on **5 August 2009**.

Given that no written reasons had been furnished as at the date of the application for leave to appeal, the applicants naturally reserved their rights to fully elaborate upon the grounds of appeal upon receipt of the written reasons aforementioned.

Although the parties filed written heads of argument subsequent to the notice of application for leave to appeal dated **5 August 2009**, no further or

additional grounds to that contained in the original notice of application aforesaid, were advanced by or on behalf of the third respondent.

In any event, on the day of the hearing of the application for leave to appeal, i.e. **25 July 2011**, Adv Boda, appearing on behalf of the third respondent, indicated that the sole basis on which leave was being sought (and in respect of which it was submitted there were reasonable prospects of success on appeal), related to the *"key"* question whether the suspensive condition had been met by the second applicant after he applied for the job in question.

3. Prior to the commencement of oral argument, I had again indicated to the parties' legal representatives that the delay in finalising the matter was not acceptable, and that the parties were entitled to speedy justice. I reiterated to counsel the reasons advanced in my written judgment of **1 October 2010**, and the subsequent delay in the matter only being argued on **25 July 2011**. Both counsel indicated that the explanation was acceptable to them, and that neither party took issue with it. Accordingly, I wish to indicate my indebtedness to the parties, and their legal counsel, for their patience, and understanding in the matter.

4. Dealing with the issue at hand, it is common cause that the second applicant was employed at South Deep Mine, and whilst so employed, he had applied for a job as a Senior Reduction Operator ("*SRO*") at the third

respondent's metallurgical plant where gold and uranium are refined. Prospective employees are usually employed subject to two conditions: first, they have to pass a polygraph test; and, second, they must undergo a medical examination.

5. The second applicant was offered employment on **13 August 2008**, which he and the employer signed, and accepted subject to the following condition:

> *"The employment is subject to your successful completion of Medical Examination".*

6. The employment contract itself, and it is also the evidence, does not describe fully or at all what the position of SRO entailed, save that the employment contract states that:

> *"The position of Senior Reduction Operator in the production department (metallurgical plant with Ezulwini Mining Company)".*

7. On **28 July 2008**, the second applicant had undergone a medical examination, and the certificate dated **1 September 2008**, reads as follows:

> *"The employee/applicant has been examined for the occupation of SRO reagent (surface). He was declared fit but under "restricted*

occupations", it was written in handwriting "for surface non-machinery with dry work ...".

8. On **1 September 2008**, the day on which the second applicant was due to start, he was told that there was no work for him. According to the third respondent, the second applicant's employment was *"nullified"* because he could not work in very dusty areas and that he was supposed to work with heavy machinery which now appears to be excluded following the medical examination.

9. The CCMA arbitrator found that no reasonable expectation was created by the third respondent in that the second applicant was aware that his employment contract was subject to a successful medical examination.

10. In my written reasons of **1 October 2010**, I set aside the award as wholly unreasonable, and stated that an analysis of the evidence before the CCMA arbitrator, and a proper reading of the review papers, the following facts were disclosed:

10.1 the second applicant was never told during his interview what the job of SRO would entail, and that he would be required to do underground work, work in wet or dry areas, or that he would be required to carry heavy machinery;

10.2 when the second applicant submitted for a medical examination, he was not asked by the medical examiner what the job entailed and moreover, that he was required to do underground work, heavy work, or work in wet or dry area areas (neither were the words *"successful medical examination"* ever defined by the employer nor was any evidence led what a *"successful medical examination"* is or was);

10.3 the medical certificate clearly states that the second applicant was fit for work albeit that there were some restrictions.

11. In those circumstances, I found that it was wholly unreasonable to withdraw an offer of employment which had been accepted, and signed in writing by the second applicant on the basis of a condition or conditions which were never disclosed or revealed to the second applicant.

12. In the review proceedings, counsel for the third respondent had admitted that the third respondent had erred but that its position nevertheless was that the second applicant was never employed. I nevertheless found that the second applicant was indeed employed, and had been offered employment in writing having met the two suspensive conditions, i.e. the polygraph test, and the medical examination.

13. It is common cause that the second applicant was offered employment on **13 August 2008**, subject to the following condition:

"The employment is subject to your successful completion of medical examination".

It is so, as counsel for the third respondent contended, that in contractual settings the phrase *"subject to"* usually creates a suspensive condition. (*Badenhorst v Van Rensburg* 1986 (3) SA 769 (A) at 777H-778 (A); *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA) 492E).

It is well-established that a condition precedent (also known as a suspensive condition) suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event. (See: *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) 695C; *De Villiers v Van Zyl* [2002] 4 All SA 262 (NC) 279; Christie's, *The Law of Contract in South Africa*, 6th ed (2011) 145).

Whether a condition is precedent or resolutive is a matter of construction (*Tuckers Land and Development Corporation (Pty) Ltd v Summerville* 1981 (2) SA 17 (C)), the words *"subject to"* being the normal way of indicating a suspensive condition. (See: *Badenhorst v Van Rensburg (supra)*; and *Parsons Transport v Global Insurance (supra)* para [12]).

14. Adv Boda who appeared for the third respondent sought to persuade me in a forceful address that not only was the condition a condition precedent, but

also that it had not been fulfilled. He contended that this was the only issue which I had to consider, and that in his view, there are indeed reasonable prospects of a court on appeal disagreeing with my earlier view expressed in my written judgment of **1 October 2010**. Adv Malan, arguing for the applicants, referred me to the evidence, and contended (equally forcefully) that the requirements were indeed met by the second applicant, and that accordingly he had indeed been employed by the third respondent, the condition precedent having been met.

15. In our law, the fulfilment of a true suspensive condition must be pleaded and proved by the person who is relying on the contract. (*Resisto Dairy v Auto Protection Insurance Co* 1963 (1) SA (AD) 644G-H).

16. Having regard to the evidence placed before the CCMA Commissioner (the second respondent), and having regard to the review papers, I am satisfied that the second applicant had indeed fulfilled the suspensive condition or the condition precedent having subjected himself to the medical examination, and having done so successfully. Not only was there no evidence of any further conditions attached to the job of Senior Reduction Operator (SRO), but none were alleged or indeed proved by the third respondent during the course of evidence and/or argument before the CCMA Commissioner.

17. In the circumstances therefore, I remain unpersuaded that there are any reasonable prospects of an appeal tribunal finding or establishing that the second applicant did indeed not fulfil the suspensive condition aforementioned.

18. Accordingly, the application for leave to appeal is dismissed.

19. In my view, the law and fairness requires that each party pay their/its/his own costs.

ARENDSE AJ
6 SEPTEMBER 2011

ADVOCATE NORMAN ARENDSE SC

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DATE: 1 OCTOBER 2010

SUBJECT: NUM obo K A MOKOENA / FIRST URANIUM MINING CO (PTY) LTD AND OTHERS / CASE NO: JR 2678/08

MESSAGE: Attached please find my written reasons for order granted on 21 July ~~2010~~. 2009.

NORMAN ARENDSE SC

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JR2678/08

In the matter between:

NATIONAL UNION OF MINEWORKERS	First Applicant
MOKOENA KA	Second Applicant

and

COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
LUNGI LUCWABA N.O.	Second Respondent
EZULWINI MINING COMPANY (PTY) LTD	Third Respondent

WRITTEN REASONS FOR ORDER GRANTED ON 21 JULY 2009

ARENDSE AJ

1. On **21 July 2009**, after having read all the documents filed of record, and having considered argument presented to me by legal representatives for the applicants, and the third respondent, I ordered as follows:

1.1 The arbitration award dated **13 October 2008** is reviewed and set aside.

1.2 The conduct of the third respondent in not appointing the second applicant amounts to an unfair labour practice.

1.3 The third respondent is to appoint the second applicant to his position retrospectively.

1.4 The third respondent is to pay the applicants' costs.

2. Subsequent thereto, the third respondent indicated that it wished to apply for leave to appeal the order aforesaid.

3. On **27 November 2009**, a copy of the transcript of the hearing that took place before me on **21 July 2009** was sent to me *"for signature"*.

4. In the meantime, the third respondent had filed heads of argument on **28 August 2009** in support of its application for leave to appeal, and it sought leave to supplement its heads of argument once written reasons were received by them. Notice of application for leave to appeal was filed on **5 August 2009**.

5. On **13 August 2009**, the Registrar notified the parties that they are required to deliver their written submissions in relation to the leave to

appeal application on **27 August 2009**, and **3 September 2009**, respectively.

6. Following various enquires by the third respondent's legal representatives, I wrote to the Registrar, and copied to the parties, that the transcript of the hearing that took place on **21 July 2009** related only to argument, and that I am still required to provide written reasons. I had undertaken to do so by no later than **31 May 2010** whereafter I would provide the parties an opportunity to make further or additional written submissions in relation to the leave to appeal application.

7. Subsequent thereto however, I was still awaiting the court files from the Registrar's office in Johannesburg, and I subsequently received same via the Labour Court Registrar in Cape Town in approximately **June 2010**.

8. During the recess period in **June/July 2010**, I had become involved in approximately 200 matters on behalf of the South African Social Security Agency (*"SASSA"*) in my private capacity, and somehow the court files had been mixed up with the SASSA files. It was only after several enquiries by the third respondent's legal representatives, and after the judgment in the SASSA matters was delivered on **13 September 2010**, that it occurred to me that the said court files may well be in the custody of the State Attorney, Cape Town. After a diligent search, and fortunately, the State Attorney managed to retrieve the court files in approximately the week of **20 September 2010**.

9. It goes without saying that any delay in handing down judgment, and providing written reasons, in a matter is not acceptable, and that the parties are entitled to speedy justice. I accordingly apologise for any inconvenience that the lengthy delay may have caused.

10. Returning to the matter at hand, the key issue for the third respondent is whether or not the second applicant, Mr K A Mokoena, was employed by the third respondent, and, if so, whether he was dismissed by the third respondent, and if so, whether such dismissal was fair.

11. It is common cause that the second applicant was employed at South Deep Mine, and whilst so employed, he had applied for a job as a Senior Reduction Operation (*"SRO"*) at the third respondent's metallurgical plant where gold and uranium are refined. Prospective employees are usually employed subject to 2 (two) conditions: first, that they pass a polygraph test, and second, that they undergo a medical examination.

12. The second applicant was offered employment on **13 August 2008**, which he and the employer signed, and accepted subject to the following condition:

> *"The employment is subject to your successful completion of Medical Examination".*

13. The employment contract itself, and it is also the evidence, does not describe fully or at all what the position of SRO entailed, save that the employment contract states that *"the position of Senior Reduction Operator in the production department (metallurgical plant with Ezulwini Mining Company)"*.

14. On **28 July 2008**, the second applicant had undergone a medical examination, and the certificate dated **1 September 2008**, reads as follows:

> *"The employee/applicant has been examined for the occupation of SRO reagent (surface). He was declared fit but under "restricted occupations", it was written in handwriting for surface non-machinery with dry work ..."*

15. On **1 September 2008**, the day on which the second applicant was due to start, he was told that there was no work for him. According to the third respondent, the second applicant's employment was *"nullified"* because he could not work in very dusty areas and that he was supposed to work with heavy machinery which now appears to be excluded following the medical examination.

16. In the CCMA arbitrator's award, the arbitrator found that no reasonable expectation was created by the third respondent in that the second

applicant was aware that his employment contract was subject to a successful medical examination.

17. In my view, the award is wholly unreasonable, and falls to be reviewed, and set aside.

18. An analysis of the evidence before the CCMA Commissioner, and a reading of the review papers, discloses the following:

18.1 the second applicant was never told during his interview what the job of SRO would entail, and that he would be required to do underground work, work in wet areas, or that he would be required to carry heavy machinery;

18.2 when the second applicant submitted for a medical examination, he was not asked by the medical examiner what the job entailed, and moreover, that he was required to do underground work, heavy work, or work in wet areas;

18.3 the medical certificate clearly states that the second applicant was fit for work albeit that there were some restrictions.

19. In these circumstances, it is wholly unreasonable to withdraw an offer of employment which had been accepted and signed in writing by the second applicant, on the basis of a condition or conditions which were never disclosed or revealed to the second applicant. The appropriate course in

the circumstances would have been to immediately commence with incapacity proceedings which may or may not have resulted in a fair termination.

20. During argument, I was told that the third respondent admitted that it had erred, but its position was that the second applicant was never employed. I find that the second applicant was indeed employed in every sense of that word, having been offered employment in writing, and having accepted it, and having met the suspensive conditions, i.e. the polygraph test, and the medical examination, which were required.

21 During the course of argument, the third respondent's legal representative requested that in the event of a finding that the second applicant was indeed employed, that I should rule that the CCMA did have jurisdiction in the matter, and refer the matter back to the CCMA for a hearing on the merits of the dismissal.

22. In the circumstances of the matter, I am not inclined to do so as once it is established that the second applicant was employed, it is common cause that such employment was summarily terminated without due process, and without a valid reason. It follows therefore that first, the second applicant was duly employed by the third respondent with effect from **1 September 2008**, and second, that the subsequent termination of the employment constituted an unfair dismissal, and as I stated in the order granted on **21 July 2009**, *"the conduct of the third respondent in not*

appointing the second applicant amounts to an unfair labour practice". As a result, the third respondent is required to appoint the second applicant to the position of SRO with effect from **1 September 2008**.

23. As stated in the order aforesaid, the third respondent is required to pay the applicants' costs.

ARENDSE, AJ

10 Oct 2010

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Reportable
Case No: JS 09/09

In the matter between:

NUMSA OBO HLONNGWANE & 20 OTHERS — Applicant

and

UNISPAN MANAUFACTURING — Respondent

Date of Hearing: 29 November 2010 to 6 December 2010 and 03 January 2011
Date of Judgment : 25 May 2011

JUDGMENT

Molahlehi J

Introduction

[1] The main issue for determination in this matter concerns the fairness or otherwise of the dismissal of the 21 (twenty one) applicants who were assisted by their union the NUMSA (the union). The applicants are contesting that their dismissals for allegedly participating in an unprotected strike was both procedurally and substantively unfair.

[2] As will appear later in this judgment some of the dismissed employee were subsequently re-employed soon after their dismissal for the same misconduct of participating in a go-slow. It is common cause that the re-employed are also applicants in this matter. The dismissals were

subsequent to an ultimatum which the respondent had issued calling upon the applicants to cease their refusal to perform according to the targets that had been set by the respondent.

[3] Initially the applicants contended that they did not individually receive the ultimatum. This position changed with the amendment wherein the applicants conceded that they each did receive the ultimatum.

Background facts

[4] It is common cause that the main issue that led to the dispute in this matter concerns performance targets which the respondent had put in place. The respondent contends that the performance targets which the applicants were required to meet had been in place both at its Qwa Qwa, where the applicants were based prior to their dismissals and the Johannesburg branches for some time prior to the applicants embarking on the go-slow.

[5] The respondent attributes the reason for the go-slow by the applicants to the demand that it should not require them (the applicants) to produce at a 100% when it had sought a 50% wage exemption from the bargaining council. At that stage the exemption which the respondent had obtained was due for renewal.

[6] The respondents contends that prior to embarking on the go-slow, the applicants had actually complied and met the performance targets and had in most of the times finished much earlier than their knock off time.

[7] The respondent dismissed the applicants on the 23 January 2008 following an ultimatum which it had issued on the 19 January 2008. The ultimatum reads as follows:

> "Ultimatum to resume work
>
> You have been on an unprotected strike (go slow or retardation of work) since June 2008.
>
> 1. We believe that your demand(s) to be 100% of wage to be paid before you intend returning to normal working targets.
> 2. Management is not prepared to meet this these demand(s) as we do currently have a wage exemption which still applies until the facilitation process has been concluded and an independent Appeals Board has made a ruling (you are specifically requested to meet the targets that were set few months ago), and unless your employment will be terminated. Your attention is drawn to the fact that this is not the first time that you have resorted to unprotected strike action.
>
> The union has been informed of your action.
>
> YOUR UNPROTECTED STRIKE WILL RESULT IN YOUR DISMISSAL WHICH MEANS THAT YU WILL LOSE YOUR JOB UNLESS YOU RETURN TO NORMAL WORKING TATRGETS BY 17H00 TODAY (19 June 2008).
>
> IF YOU RETURN TO NORMAL WORKING TARGETS BEFORE THE DEADLINE YOU WILL NOT BE DISMISSED."

[8] The consideration which the respondent says it took into account in dismissing the applicants was that they were all on final written warnings

which they received for participating in an unprotected strike during January 2008. including the two warnings which they received prior to the ultimatum.

[9] The respondent in support of its version that the dismissals of the applicants were for a fair reason called three witnesses, Mr McAslin. Mr Jonosky and Mr Furgerson. The essence of their testimonies was that the performance targets which the applicants were refusing to meet were in place both at the Johannesburg and the Qwa Qwa branches. As stated earlier, according to them the applicants did not have any problem in meeting the targets previously. The problem arose when the applicants heard that the respondent intended to apply for another wage exemption from the bargaining council.

[10] Mr McAslin testified that in opposition to the application for the wage exemption. the applicants addressed a letter to the respondent wherein they stated the following:

> "We are sure that you are going to listen to our demand.
> We think if we don't get 100% we must see other means
> to get it."

[11] The version of the applicants on the other hand, is that they were expected to perform their duties according to performance targets which were not

only unreasonable but were also unilaterally introduced by the respondent and were unattainable.

[12] The issue of the performance targets was discussed at the meeting of 24 April 2008, with Mr Jonosky. At that meeting, the applicants submitted a proposal which they regarded as reasonable and achievable performance targets. The proposal was rejected by the respondent.

[13] As concerning the number of warnings which had been issued against them by the respondent for failing to meet the performance targets, the applicants say that they were regularly issued with written warnings without ever been given a hearing.

[14] The applicants do not seem to dispute that at some stage, they used to meet the performance targets. They however say that in order to meet those targets, they either had to help each other or go back to work after knock off to complete their tasks or did that without having to be paid for overtime. They however never lodged any complaint either with the respondent or the union about the no payment of the overtime.

[15] The applicants were issued with written warnings on 9 and 11 June 2008. On 10 June 2008, the union requested a meeting with the respondent for 19 June 2008 for the purposes of discussing the performance targets. A day before that meeting, the respondent held a meeting with the applicants

without the union and informed them that it intended issuing an ultimatum against them for participating in an unprotected strike and that a decision whether or not to dismiss them will be taken.

[16] The applicants say it was at this meeting that the respondent told them that the reason for their failure to meet the targets was because they were not happy with the wage exemption it had received.

[17] It is common cause that the ultimatum was issued at 12:38 on 19 June 2008. The applicants contend that the ultimatum was unfair because of the following reasons:

> "18.1 The first applicants were not given enough time to intervene and advice the further applicants.
> 18.2 The ultimatum did not clearly indicate what was expected, from the second to further applicants.
> 18.3 The deadline of 17h00 was applicable to both day and night shifts despite the fact that night shift started as 18h00."

[18] On 20 June 2008. the parties held a meeting which as indicated earlier had been at the request of the union. The discussion at that meeting concerned the performance targets. The following are common cause arising from that meeting and subsequent thereto:

- The parties deadlocked on the issue of performance targets.

- The union informed the respondent that it intended referring a dispute concerning the issue of performance targets to the bargaining council.
- The respondent did not at that stage indicate its intention to dismiss the applicants on 23 January 2008.
- The meeting ended up at 18:30
- The applicants did not work on the weekend of 21 and 22 June 2008.
- The applicants were issued with letters of termination of their employment on 23 June 2008.
- On 24 June 2008, the respondent re-employed one of the employees who participated in the alleged go-slow.
- Subsequent to the dismissal of the applicants, the respondent advertised those positions that had become vacant as a result of the dismissal of the applicants.
- Thereafter, 10 of the applicants were reemployed.

Did the applicants participate in an unprotected strike?

[19] There are two conflicting versions as to what happened prior to the dismissals of the applicants. The respondent contends that the applicants were on a go-slow which amounted to an unlawful strike action. The applicants on the other hand, contend that they were not on a strike action but that there was a dispute between them and the respondent regarding the unreasonable and unilaterally imposed performance targets.

[20] It is trite that an employer is entitled to treat an unprotected and illegal strike action as misconduct. The employer is therefore entitled to dismiss its employees for that reason. Section 213 of the Labour Relations Act[1] (the Act) defines a strike action as follows:

> "Strike.means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory."

[21] The issue as to whose version to accept as concerning whether or not the applicants participated in an unprotected strike action can be resolved by resorting to the approach which was enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martel en Kie and Others*[2] In dealing with what approach to adopt when faced with conflicting versions, the Court in that case held that the technique to apply generally entails making credibility findings on the witnesses that testified, their reliability and the probabilities.

[22] In the present instance, my view is that the two conflicting versions can be resolved by way of probabilities without resorting to the credibility of

[1] 66 of 1995.
[2] *2003 (1) SA 11 (SCA).*

witnesses. The version of Mr Hlongwane is that the performance targets were unilaterally introduced in October 2006 at the time when the contracts of the temporary employees were converted into permanent appointments. According to him, the targets set by the respondent were unreasonable and thus difficult to meet unless they either helped each other and or work over time without pay. He further said that they were regularly issued with written warnings for failing to meet the performance targets which were done without a hearing.

[23] It is undisputed that whatever the means, the applicant did meet the targets prior to April 2008. It is common cause that on 24 April 2008, the applicants suggested a reduction in the performance targets. The respondent rejected the proposal.

[24] A proper analysis of the evidence of Mr Hlongwane indicates that the applicants were unhappy with the performance targets required of them and that at some point, decided not to perform according to those targets. The probabilities indicate that the refusal to perform in accordance to the targets was because the applicants were aggrieved by the fact that their efforts were not compensated in the same as others in the sector. The applicants therefore demanded that the performance targets be reduced in line with what they were earning. In an effort to coerce the respondent to accede to their demand the applicants resorted to a go-slow which in my view falls

with the definition of a strike action as envisaged by the Act. The applicant in embarking on the go-slow did so without ensuring compliance with the procedural requirements of the Act. This amounted to misconduct which entitled the respondent to take disciplinary action against the applicants.

Was the dismissal of the applicants unfair?

[25] As indicated earlier, the applicants are challenging both the procedural and substantive fairness of their dismissal. The issue of fairness or otherwise of the dismissals of the applicants turns around mainly two issues, namely the selective re-employment of others who also participated in the strike action and the ultimatum.

[26] The approach to be adopted when confronted with the issue of inconsistent application of discipline or in the application of what is sometimes referred to as the parity rule is well established. It is trite that the complaint about the inconsistent application of discipline is a factor that needs to be taken into account in the assessment and evaluation of the fairness of the dismissal of the employee complaining about the same.

[27] In *SACCAWU and Others v Irvin v Johnson Ltd*,[3] the court in dealing with the issue of inconsistent application of discipline had the following to say:

> "... Where, however, one is faced with large number of offending employees, the best that one can hope for is reasonable consistency. Some consistency is the price to be paid for flexibility, which requires the exercise of

[3] (1999) 20 ILJ 2303(LAC) at para 29

> discretion in each individual case. If a chairperson (of disciplinary hearing) conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality dismissal, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy..."

[28] The Labour Appeal Court confirmed the approach adopted in *Irvin v Johnson* in its decision in *Cape Town City Council v Masitho & Others*,[4] where it was confronted with a case where an employer had dismissed some employees but issued a warning to another employee who was also accused of the same offence. In dealing with the issue of selective discipline, the Labour Appeal Court had the following to say:

> "In SACCAWU & others v Irvin & Johnson Ltd [1999] 8 BLLR 741 (LAC) at 751B this Court reiterated that consistency is an element of disciplinary fairness, and that it 'is really the perception of bias inherent in selective discipline which makes it unfair but went on to observe that the flexibility which is inherent in the exercise of discretion will inevitably create the potential for some inconsistency. I am not at all sure that disciplinary decisions involve the exercise of a discretion, but even if that is so, fairness would seem to

[4] (2000) 21 ILJ 1957 (LAC)

> me to generally require any such discretion to be exercised consistently. While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency (751D), in my view the proper course in such a case is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequences of at least a perception of bias."[5]

[29] It is now clear from the authorities that there is no rule that consistency in disciplinary cases is *per se* unfair. However consistency is an aspect to be taken into account in assessing the fairness of a disciplinary action. This was stated in *Lubners Furnishers v SA Commercial Catering & Allied Workers Union & another*[6] as follows:

> "There is, however, no rule that selective action *is per se* unfair; the question depends on the circumstances of each case."

---

[5] Id at para 14.
[6] (1996) 17 ILJ 660 (LAC) at 671 A.

[30] Once the issue of inconsistent application of discipline is raised, the duty is on the employer to justify the differentiation in the disciplinary action. In other words where inconsistent application of discipline is raised, the employer must lead evidence showing why employees were treated differently when they were all involved in the same offence. See *Rustenburg Platinum Mines Ltd (Bafokeng Rasimone Platinum Mine) v CCMA & Others.*[*]

[31] In the present instance, except for saying that those who were re-employed applied for the positions as advertised, the respondent led no evidence justifying the differential treatment of the applicants. In relation to the employee who was re-employed a day after the dismissal of the applicants, the respondent says he was re-employed because he said that he participated in the strike because he was intimidated to participate therein.

[32] The respondent in the present case has failed to produce evidence that provides fair bases for treating the applicants differently to those who it re-employed after the dismissals. It is for this reason that I find the dismissals of the applicants to be unfair.

[33] I now turn to deal with the issue of the fairness of the dismissal in as far as the ultimatum is concerned. The requirement of a fair ultimatum was stated

[*] /2006] 11 BLLR 1104 (LC).

in *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Unions*[5] as follows:

> "In my judgment a fair ultimatum in the circumstances of this case should have been of sufficient duration to have enabled...the employees time to cool down, reflect and take a rational decision with regard to their continued employment, and for that purpose to seek advice from their trade union."

[34] The underlying purpose of an ultimatum is not only to warn the striking employees of the possible dismissal arising from their misconduct but more importantly to persuade them to cease their unlawful conduct. If the employees fail to heed the terms of the ultimatum, the employer should afford them the opportunity to explain their failure to comply with the ultimatum.

[35] In my view, the action of the respondent based on the ultimatum is unfair if regard is had to the totality of the facts and circumstances of this matter.

[36] It is common cause that the respondent despite having concluded as early as 11 June 2008 that the applicants were on an illegal strike only informed the union on 19 June 2008 about the strike action when it served it with the ultimatum which was served at 12:38. It was also not disputed that the union official received the ultimatum at 15h04 on 19 June 2008, making it difficult for him to intervene and advice the applicants regarding the

[5] 1994 (2) Sa 204 AD at para 217 B-C

contents and implications of the ultimatum. The *"3 day cooling off period"* was never communicated to the union.

[37] In my view, had the respondent acted fairly by involving the union earlier even before issuing the ultimatum, the dismissal could in all probabilities have been avoided. The timeous involvement of the union in the process of considering issuing of the ultimatum could have provided the union the opportunity to explain to the applicants the possible consequence of their conduct.

[38] The ultimatum was itself unfair because it was confusing in that it was given to both the day and night shift at the same time. It should be noted that the deadline for compliance with the terms of the ultimatum was 17h00 whilst the night shift hours are from 18h00 to 06h00. In other words the night shift employees could not comply with the ultimatum, even if they wished to do so because the period for compliance had expired by the time they commenced their duties on that day. In this respect, Mr Jonosky conceded under cross examination that the ultimatum did not make sense in as far as the night shift employees were concerned.

[39] The ultimatum is also unfair because the applicants were not given enough time to consider it and also for the union to consult with them about it terms and implications.

[40] I accept that in certain circumstances the issuing of an ultimatum may satisfy the requirement of a hearing in terms of dismissing employees who are on an illegal strike. .This may be so particularly where the illegal strike is accompanied by a high level of violence and intimidation.

[41] In the present instance, nothing made it difficult or impossible for the respondent to convene a disciplinary hearing prior to terminating the employment of the applicants. In fact, the version of the respondent is that the meeting of 20 June 2008 served as the disciplinary hearing. The applicants disputed that that meeting which was convened at their request constituted a disciplinary hearing. There is insufficient evidence before this court to support the assertion of the respondent that the meeting of 20 June 2008 constituted an informal disciplinary hearing. The meeting focused on the issue of the targets including the proposal of the respondent to reduce the targets by 10%. The applicants were never called upon during that meeting to show cause why they should not be dismissed for participating in an illegal strike and or failing to meet the terms of the ultimatum the previous day. As stated earlier, the meeting ended when the parties deadlocked on the issue of the targets and the union indicating its intention to refer a dispute concerning the same to the bargaining council.

[42] In light of the above, I am of the view that the dismissals of the applicants were both substantively and procedurally unfair. The applicants have

indicated that they no longer wish to be reinstated in their previous positions. The applicants require only compensation for the unfairness of their dismissals. I have found no reason from the facts and the circumstances of this case not to award the maximum compensation as provided for in the law for those applicants who were not re-employed. I further see no reason in law and fairness why costs should not follow the results.

[43] In the premises the following order is made:

1. The respondent is to pay compensation to those of the applicants who were subsequently re-employed.
2. The respondent is to compensate the applicants who were never re-employed in the amount equivalent to 12 (twelve) months calculated at the salary they received as at the time of their dismissals.
3. The respondent is to pay the costs of the applicants.

Molahlehi J

Appearances:

For the Applicant: Adv P Nkutha instructed by Finger Phukubje Inc. Attorneys

For the Respondent: Adv MA Lennox, instructed by Allan Labrum Moni Attorneys

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: J 2082/10

On the 12th day of November 2010
Before the Honourable Mr Acting Justice Shaik

In the matter between:

SOUTH DEEP MINE (A DIVISION OF GFI MINING SOUTH AFRICA (PTY) LTD) APPLICANT

AND

NATIONAL UNION OF MINEWORKERS 1ST RESPONDENT

THE INDIVIDUAL RESPONDENTS LISTED IN ANNEXURE A 2ND RESPONDENT

ORDER

Having read the documents and having considered the matter:

IT IS ORDERED THAT:

1. The interim is discharged.

2. The Applicant tenders to pay the Respondent's costs on the party and party scale, including the costs of junior counsel throughout and the costs of senior counsel with effect from 29 October 2010.

3. The parties will endeavour to reach agreement on the quantum of costs, as set out above, failing which the matter will be set for taxation.

BY THE COURT

REGISTRAR

IN THE DISCIPLINARY HEARING

HELD UNDER THE AUSPICES OF TOKISO

In the matter between:

XSTRATA ALLOYS (*"Lion Ferrochrome"*)	Employer
and	
KELETSO MOTLAASE (*"MOTLAASE"*)	Employee

DISCIPLINARY ENQUIRY : FINDINGS ON SANCTION

CASE NUMBER: **TOKISO P10/016**

DATE OF OUTCOME: **13 MAY 2010**

PANELLIST: **AFZAL MOSAM**

Tokiso Dispute Settlement (Pty) Ltd
Tel: 011 544 4800
Fax: 011 544 4825
Email: info@tokiso.com
Address: 25 Wellington Road, Parktown, Johannesburg

INTRODUCTION

1. On 21 April 2010, I handed down a finding that Mr Keletso Motlaase was guilty of misconduct. I directed the parties to submit written argument on the question of an appropriate sanction for such misconduct.

PARTIES SUBMISSIONS

2. For the Employer it was submitted in the main that Lion Ferrochrome runs a 24 hour – 7 day operation production ferrochrome. The production of ferrochrome involves a significant number of complicated steps and therefore each employee plays a pivotal role in the success of the operation.

3. Motlaase was employed by Lion Ferrochrome as an Instrument Technician and his duties involved the maintaining, servicing and repairing of equipment and machinery critical to Lion Ferrochrome's operation. It is especially critical in a breakdown, repair or shutdown situation that Motlaase completes the job he is assigned. Failure to do so halts the entire production process.

4. Motlaase was found guilty of serious misconduct in that he refused to obey a lawful and reasonable direct instruction from the Acting Instrumentation Superintendent to return and complete his job.

5. Motlaase was further found guilty of insolence in that he showed disrespect to the Acting Instrumentation Superintendent and this is clearly evident of Motlaase's unacceptable attitude towards authority, and his reluctance to perform his duties.

6. Reference was made to the Code of Good Practice and the evidence of Rulph Motshweni and Phillip Bosch, who worked with Motlaase on a daily basis and who testified that they cannot work with Motlaase as they no longer trust him and furthermore, that they could not rely on Motlaase to perform his job functions independently.

7. Regarding the proximity of the time of the misconduct, it was submitted that it occurred just prior to Motlaase's knock-off time and Motlaase saw this as an opportunity to leave the workplace at the normal knock-off time in circumstances where he was required to first complete the assigned task.

8. This conduct, it was submitted, is indicative of an employee who does not have the best interest of his employer at heart and shows a clear lack of commitment. This conduct was further aggravated by the fact that when Motlaase was instructed to return to the workplace to complete the task, he refused and instead said: *"Call the standby to complete it"* and put the phone down on the Acting Instrumentation Superintendent.

9. It is submitted that the personal circumstances of Motlaase should not weigh heavily in his favour in that whatever prejudice that Motlaase may have suffered should he be dismissed, is a result of his own making. Motlaase has in the past been disciplined for ignoring an instruction. In a period of less than a year he was found guilty of committing a similar offence and this is indicative that Motlaase is not an employee who is prepared to change and act in a manner that is conducive of a good employment relationship.

10. In the circumstances, it was submitted that a fair and appropriate sanction is to recommend that Motlaase be dismissed.

11. For Motlaase it was submitted that Lion Ferrochrome's disciplinary code and procedure (*"the Code"*) is clear on the purpose and implementation thereof. The Code clearly states on p.6 clause 8.5 that:

> *"The intention of this procedure is in no way to punish employees but rather than to correct unacceptable behaviour. Such correctional behaviour must be firm and effective."*

12. The Code further states in clause 8.10 that:

> *"An employee will be dismissed if the accumulative balance of points after the last offences is 11 points ore more."*

13. The Company uses the system of awarding points to impose penalties. In brief, the system works as set out in clause 9.2.4 and 9.2.3 [?] respectively. Clause 9.2.4 states that:

> *"When an offence is committed, covering aspects falling in more than one category the penalty points for the more serious aspect only will be awarded."*

Clause 9.2.3 states that:

> *"For each month in which no disciplinary action is taken against the employee, one credit point will be awarded up to a maximum of minus 6 points. However, for the month in which a disciplinary action has been taken, no credit points shall be given."*

14. The Code sets out the types of offences and possible points to be awarded in clause 9.1.6 on p.9 of the Code. The offences which Motlaase found guilty of are set out as follows:

14.1 *"Refusal to carry out direct instruction"* Under Category A. Points to be awarded are between 7 – 11.

14.2 *"Desertion of post without permission"* Under Category B. Points to be awarded is between 6 – 9.

15. Regarding the finding of guilt relating to *"desertion of post without permission"*, the circumstances were such that Motlaase found it unacceptable that Van Coller interrupted the calibration process. Motlaase felt undermined and abandoned the calibration process and did not sign the work permit to handover the plant to the production team.

16. Relating to the misconduct of *"failure to obey a direct instruction to return to the workplace to complete a calibration"*, it was submitted, the circumstances related directly to the calibration process being interrupted and being undermined.

17. With regard to the finding of insolence, it was submitted that Motlaase was not charged with the misconduct of rudeness and therefore I, as the Chairperson, should not impose any penalty points on this guilty finding.

18. It was submitted that apparently Motlaase is on minus 6 points and that I should impose the minimum points as a penalty for the misconduct committed.

19. Regarding Motlaase's personal circumstances, it was submitted as follows:

    19.1 Motlaase is the sole breadwinner at home. His wife is unemployed due to limited employment opportunities in the

area. He supports his wife and two minor children who are still attending school.

19.2 He stays in the company house and should the sanction of dismissal be imposed, he would be without accommodation and this would lead to disruption of his children's schooling.

20. In conclusion it was submitted an appropriate and fair sanction under the circumstances would be a sanction short of dismissal.

Discussion

21. In considering a dismissal for misconduct, item 3(4) of the Code provides that:

> *"Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject got the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer or gross insubordination."*

22. This is not Motlaase's first offence. The sanction question in the present case is whether or not the misconduct of which he has been

found guilty is so serious and of such gravity that it makes the continued employment relationship intolerable.

23. In mitigation, account should be taken of the fact that the acts of misconduct for which Motlaase was found guilty are in inextricably linked. Arising from the desertion of the post, Motlaase refused to carry out a direct instruction to return to the LCR to finish the calibration. As a result of these incidents, I found that Motlaase acted in an insolent manner towards Bosch.

24. The relevant factors, I am required to consider, are the nature of the employer's business, the type of employment in which the employee is engaged, the circumstances of the misconduct complained of, the proximity in time of the misconduct and its relationship to the employment of the employee. The employee's personal circumstances are also to be considered.

25. The nature of the business of Lion Ferrochrome is that it is mining operation which operates on a 7 day – 24 hour basis. As correctly submitted by Lion Ferrochrome's representatives, this requires all the employees to act as a cohesive unit in order to ensure the success of the mining operation.

26. It is clear from the evidence in the disciplinary hearing that Lion Ferrochrome expects a high standard of its employees and wanton misconduct will not be readily tolerated.

27. In considering the proximity and time of the misconduct, as I have indicated, previously, it should be noted that the first charge emanates from the abandonment of the calibration process and that the subsequent acts of misconduct are related to this incident.

28. A fundamental issue that I need to consider is whether I should give Motlaase a second chance. The facts show that the misconduct committed by Motlaase was wilful, but I am not convinced on the evidence presented, that Lion Ferrochrome does in fact find itself unable to trust Motlaase in relation to the aspects of the job for which he was employed. Put otherwise, I am not convinced that taking into consideration all the circumstances and the evidence in the matter, that the relationship has irretrievably broken down to the extent that Motlaase's services be terminated.

Recommendation

29. I recommend that a fair and appropriate sanction is that Motlaase be given a final written warning. The employer is to decide the number of points to be allocated as per the disciplinary code of Lion Ferrochrome.

A MOSAM

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE. YES/NO.

(2) OF INTEREST TO OTHER JUDGES. YES/NO.

(3) REVISED.

02. VII. 09
DATE

SIGNATURE

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO: JR 2006/08

GOLD FIELDS MINING SOUTH AFRICA (PTY) LTD (KLOOF GOLD MINE)	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First respondent
KEISHO N N.O.	Second respondent
THE NATIONAL UNION OF MINEWORKERS	Third respondent
SEHLOHO, M.N.	Fourth respondent

JUDGMENT

VAN NIEKERK J

[1] This is an application brought in terms of s 158 (1) (g) of the Labour Relations Act (the LRA) to review and set aside a certificate issued by the second respondent (the commissioner) on 8 August 2008. In addition to that relief, the applicant seeks an order substituting the certificate with an

order that the dispute remains unresolved and referring the dispute to this court for adjudication.

[2] In the certificate of outcome, the commissioner categorised the dispute referred to the CCMA by the fourth respondent as one relating to "reasons unknown", and indicated that should the dispute be pursued, it ought to be referred to the CCMA for arbitration.

[3] The facts that give rise to this application are undisputed. The applicant employed the fourth respondent until his dismissal on 13 June 2008. The applicant contends that the fourth respondent was dismissed because of his participation in what it alleges was an unprotected strike. The fourth respondent denies participating in the strike, and avers that he was absent from work on the day of the strike on account of ill health. He contends that he does not know the reason for his dismissal.

[4] On 8 July 2008, the fourth respondent referred a dispute to the CCMA, using the prescribed LRA Form 7.11. He categorised the dispute as one concerning an unfair dismissal and recorded in part B of the form and in response to the question "Why were you dismissed?", that the reason for dismissal was unknown.

[5] A conciliation meeting was held on 29 July 2008. At the meeting, the applicant's representative, a Mr Heathcote, advised the presiding commissioner that the dispute concerned a dismissal for participation in unprotected industrial action, and that should the dispute remain unresolved, the CCMA would not have jurisdiction to arbitrate as s 191 (5)(b)(iii) of the LRA required the dispute to be referred to this court. Heathcote handed to the commissioner documents relating to the fourth respondent's dismissal, in which the applicant had recorded that the reason for the fourth respondent's dismissal was his participation in

unprotected strike action. The fourth respondent handed in a medical certificate for the period of the industrial action. It was then agreed that the thirty-day conciliation period be extended to provide the applicant with an opportunity to consider the certificate. On 7 August 2008, the applicant advised the CCMA that the dispute could not be resolved, and requested the commissioner to issue a certificate of outcome to that effect. The applicant reiterated that the fourth respondent's dismissal related to participation in an unprotected strike, and that the certificate of outcome should reflect that the dispute ought to be referred to this court for adjudication if the fourth respondent wished to pursue his unfair dismissal claim.

[6] On 8 August 2008, the commissioner issued a certificate of outcome. The certificate records that the dispute was referred for conciliation on 7 July 2008, that the dispute concerned an unfair dismissal relating to "reasons unknown", that as at 8 August 2008 the dispute remained unresolved, and that it could be referred to the CCMA for arbitration.

[7] On 21 August 2008, the applicant launched an application to vary the certificate of outcome on the grounds that it contained an obvious error. The error that the commissioner was said to have perpetrated was to have recorded a reason for dismissal that was factually incorrect. On 8 September 2008, the third respondent addressed a letter to this court stating that the matter should be referred to the court as the dismissal "was related to a protected strike" and that the commissioner had erroneously indicated that the matter related to unknown reasons and that it should be referred to arbitration.

[8] The next day, 9 September 2008, the third respondent referred the dispute to arbitration. On 8 October 2008, the third respondent filed a notice of opposition and an answering affidavit to the application to vary the

certificate. At the time that the founding affidavit in these proceedings was filed, no ruling had been made in respect of that application.

[9] On 13 October 2008 the applicant's attorneys wrote to the third respondent's attorney, placing on record the fact that the third respondent had admitted in writing that the dispute ought to be referred to this court, and requesting that the dispute before the CCMA be withdrawn. On 14 August 2008, the third respondent's attorney replied, denying that the fourth respondent was dismissed for participation in industrial action, and further denying that the certificate of outcome had been erroneously issued.

[10] In these proceedings, the applicant contends that all of the facts indicating the true reason for the fourth respondent's dismissal were before the commissioner and that given the contents of the certificate of outcome, the commissioner simply ignored and did not consider what was before her i.e. she did not in fact determine the jurisdictional point raised by the applicant, or she failed to apply her mind properly to what was before her and thus did not act as a reasonable commissioner would have acted. In other words, a reasonable commissioner, so the applicant contends, would have concluded on all of the facts that the true reason for the fourth respondent's dismissal was his participation in an unprotected strike and would have concluded further that the CCMA did not have jurisdiction to arbitrate the dispute.

The law

[11] The dispute resolution system established by the LRA places a premium on conciliation. In broad terms, all dismissal disputes must be referred to conciliation before proceeding to the stage of either arbitration or adjudication. Whether a dispute is to be arbitrated by the CCMA or

adjudicated by this court depends on the reason for dismissal. However, when the reason for dismissal is itself the subject of a dispute, the LRA provides no clear guidance on how the dispute is to be resolved. Two broad approaches appear to have emerged. The first is to regard the matter as one concerning jurisdiction, and to require a conciliating commissioner to determine the dispute about the reason for dismissal at the conciliation stage. On this approach, the certificate of outcome (at least in so far as it categorises a dispute and indicates the forum to which it should be referred) represents a jurisdictional ruling. The second approach is to attach no jurisdictional significance to the certificate of outcome, and to regard the certificate as no more than a record that on a particular date, a dispute referred to the CCMA in particular terms remained unresolved. On this approach, while a conciliating commissioner will normally indicate the nature of the dispute in the certificate of outcome, the categorisation or description of the dispute has no bearing on the future conduct of the proceedings. In particular, the forum for any subsequent proceedings initiated by a referring party is determined by what the employee alleges the dispute to be, and irrespective of the terms in which the certificate was completed.

[12] In my view, for the reasons recorded below, the LRA clearly adopts the latter approach. In other words, a certificate of outcome has no legal significance beyond a statement that the dispute referred to conciliation has been conciliated and was resolved or remained unresolved, as the case may be. In so far as the pro forma certificate makes provision for a commissioner to categorise the dispute and to indicate the means by which or the forum in which it is ultimately to be resolved, these are not functions contemplated by the Act, and they have no legal significance.

[13] Section 135 of the LRA regulates the resolution of disputes through conciliation. In broad terms, the section requires a commissioner to be

appointed to attempt to resolve a dispute referred to the CCMA within a period of 30 days from the date on which the referral was received. Section 135 (5) provides:

> *"When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-*
>
> (a) *the commissioner must issue a certificate* ***stating whether or not the dispute has been resolved***; (emphasis added)
>
> *(b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and*
>
> *(c) the commissioner must file the original of that certificate with the Commission."*

The subsection is curiously drafted. The preamble anticipates the failure of the conciliation process and the lapse of the 30-day (or agreed further period), but not the successful resolution of the referred dispute. It seems to me that two scenarios are contemplated. The first is that a conciliation meeting is convened within the 30-day period and that the commissioner's intervention fails to resolve the dispute. In this instance, the commissioner must issue a certificate stating that the dispute remains unresolved. The second scenario contemplates the expiry of the 30-day period (or further agreed period) with no conciliation meeting having been convened; alternatively, the expiry of the 30-day period or any agreed further period. At that point, a conciliation meeting may have been convened (or not), and the dispute would have been resolved (or not) through conciliation or by any other means. In the first instance, the obligation to issue a certificate is triggered by an event (the failure of a conciliation convened within the

30-day period); in the second instance, the obligation is triggered by the effluxion of time (the expiry of the 30-day or agreed further period).

[14] Section 135 (5), to the extent that it considers the issuing of a certificate to be mandatory, sits uncomfortably with those provisions of the Act that regulate the statutory dispute resolution process beyond the conciliation stage. In the case of disputes about unfair dismissals[1] section 191 (5) provides:

> *"If a council or a commissioner has certified that the dispute remains unresolved,* ***or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved-***
>
> *(a) the council or the Commission must arbitrate the dispute at the request of the employee if:*
>
> *(i)* ***the employee has alleged that the reason for dismissal*** *is related to the employee's conduct or capacity, unless paragraph (b) (iii) applies...*
>
> *(iii) the employee does not know the reason for dismissal..*
>
> *(b) the employee may refer the dispute to the Labour Court for adjudication* ***if the employee has alleged that the reason for dismissal*** *is -*
>
> *(i) automatically unfair;*
>
> *(ii) based on the employer's operational requirements;*

[1] In the context of strikes and lock-outs, s 64(1) (a) (i) and (ii) impose as one of the procedural constraints on the exercise of those rights that *"a certificate stating that the dispute remains unresolved has been issued..."* or *"a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission:..."*. If there is a dispute about the categorisation of the dispute that gives rise to the industrial action (and in particular whether the dispute is one lawfully capable of resolution by industrial action) this would normally be resolved by this court in an application to interdict the industrial action concerned.

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; ..." (emphasis added).

This wording clearly contemplates that if 30 days have elapsed from the date on which the CCMA received the referral of the dispute, the dispute may be referred to arbitration or to this court for adjudication without a certificate of outcome, or, as Freund AJ put it in *Seeff Residential Properties v Mbhele NO & others* (2006) 27 *ILJ* 1940 (LC), "*... even if a certificate of outcome has not been issued, arbitration remains mandatory if 30 days have expired since the council or the commission received the referral and if the employee requires this.*" (at 1946A). In this sense, the legal effect of a certificate of outcome is therefore minimal, if there is any effect at all. It is a misconception to suggest therefore, as the applicant does in these proceedings, that a party is entitled to secure, whether by way of an application to vary or an application for review, that a certificate is cast in particular terms as to the nature of the dispute or the ultimate destination of the dispute in the statutory dispute resolution scheme.

[15] The wording of s 191(5) also contemplates that it is not for the conciliating commissioner to interrogate the nature of the dispute as it appears on the referral form or make any ruling as to the forum to which an unresolved dispute may ultimately be referred. An employee is entitled to refer a dispute to this court or require that a dispute be arbitrated on the basis of the reason for dismissal alleged by the employee. It is the referring party's categorisation of the dispute (and nothing more) that triggers either the arbitration or the adjudication of the dispute. To the extent that it can be said that an arbitrator or this court assumes jurisdiction upon the referral of a matter, the Labour Appeal Court has described this as a "provisional assumption of jurisdiction". In *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 *ILJ* 1042 (LAC), the LAC held that in relation to referrals to this

court, the Act contemplated a situation where this court initially takes as correct the referring party's allegation of the reason for dismissal, and proceeds to hear the matter. If it becomes apparent during the hearing that the reason for dismissal is in fact a reason that in terms of s 191(5) (a) required that the dispute be referred to arbitration, then the court is required to deal with the matter in terms of s 158(2) either by staying the proceedings and referring the matter to arbitration, or by sitting as arbitrator with the parties' consent. The LAC summarised the point as follows:

> *"In the light of the above, it seems to us that the employee's allegation of the reason for dismissal as contemplated by s 191 (5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to finally resolve the dispute on the merits. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits"* (at para [24] of the judgment).

Although the *Wardlaw* decision dealt with a matter referred to this court that the employer party contended ought to have been referred to arbitration (the converse is the case in the present instance), the principle to be applied is that jurisdiction is conferred on the CCMA, on a provisional basis, by the referring party's categorisation of the reason for dismissal.[2]

[2] There is no equivalent to s 158(2) in relation to arbitration proceedings. It seems that parties who find themselves in a position where the reason for dismissal appears to be one in respect of which the CCMA does not have jurisdiction, the arbitration proceedings ought to be stayed to

[16] A recent judgment of the Constitutional Court supports this approach. In *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC), the majority of the court (per Ngcobo J) held:

> *"A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts.* ***The dispute between the parties may only emerge once all the evidence is in***" (at para 66 of the judgment, emphasis added).

[17] There is another reason why the Act should not be interpreted to permit or require a commissioner at the conciliation phase to make a jurisdictional ruling based on the reason for dismissal that the referring party asserts. It is the referring party's right to frame an unfair dismissal claim in any way

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permit a referral to the Labour Court. Alternatively, the parties may agree to continue with the arbitration – see s 141(1).

that he or she deems fit, and it is not for the commissioner (or the employer) to decide for that party how the claim should be formulated and in which forum the relief sought is to be pursued. In *National Union of Metal Workers of SA & others v Driveline Technologies (Pty) Ltd & another* (2000) 21 *ILJ* 142 (LAC), Zondo AJP (as he then was) expressed the principle in the following way:

> *"A commissioner who conciliates a dispute is not called upon to adjudicate or arbitrate such dispute. He might take one or another view on certain aspects of the dispute but, for his purposes, whether the dismissal is due to operational requirements or to misconduct or incapacity, does not affect his jurisdiction. It is also not, for example, the conciliating commissioner to whom the Act gives the power to refer a dismissal dispute to the Labour Court. That right is given to the dismissed employee. (See s191 (5) (b)). If the employee, and not the conciliating commissioner, has the right to refer the dispute to the Labour Court, why then should the employee be bound by the commissioner's description of the dispute?"*

[18] In *Ingo Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg and Bean Suncoast* (unreported, D412/07), I recently had occasion to summarise the legal position in these terms:

> *"It follows that when a commissioner completes Form 7.12 and categorises the dispute referred to the CCMA by ticking one of the boxes provided, the commissioner does not make a jurisdictional ruling. Nor does the ticking of any of the boxes marked "CCMA arbitration", "Labour Court" "None" or "Strike/Lockout" amount to a ruling on which of those courses of action must be pursued by a referring party. Consistent with the principle established in the*

driveline case. It is not for commissioners, by means of certificates of outcome or otherwise, to dictate to litigants either how they should frame the disputes that they might wish to pursue or which forum they are obliged to approach to have those disputes determined. Litigants must stand and fall by the claims that they bring to arbitration. They run the risk that during the arbitration proceedings, a commissioner might decide, in terms of Rule 22 of the CCMA Rules, that a referring party should be required to prove that the commission has jurisdiction to arbitrate the dispute. (This assumes, of course, that the issue giving rise to the jurisdictional point has not previously been the subject of a ruling by a commissioner, either at the commencement of the conciliation phase or at any time thereafter) if a referring party ought reasonably to have foreseen that the reason for the disputed dismissal or a reason that contributed significantly to it was such that the dispute ought to have been referred to this court, there is no reason why an order for costs should not be made in terms of Rule 39(1) of the CCMA Rules in respect of a jurisdictional ruling made against that party."

[19] To the extent that the applicant's case rests on the contention that the commissioner had before her a jurisdictional point that she was required in terms of CCMA rule 14 to decide or that she failed properly to decide, this application stands to be dismissed on the reasoning articulated above.

[20] In general terms, it seems to me that despite the wording of Rule 14, jurisdictional points are better determined after the hearing of evidence (and subject to the commissioner's direction) at the arbitration phase in terms of rule 22 of the CCMA Rules. This is particularly so in regard to points such as whether the referring party was an "employee" as defined by s 213, or was "dismissed" for the purposes of s 186. In practical terms,

the only jurisdictional points that appear to be relevant at the commencement of the conciliation phase are those that relate to the time limits for the referral of disputes to conciliation that the Act prescribes (where there is no application for condonation for a late referral), or whether a bargaining council has jurisdiction over the parties to the dispute (in the absence of any exercise of the discretion conferred by s 147), and perhaps whether on the face of it, the dispute referred for conciliation is not one that is contemplated by the Act, i.e. the dispute concerns a matter other than a matter of mutual interest between employer and employee. To permit other points *in limine* (especially those that relate to employment status and the existence of a dismissal) to be raised at the conciliation phase and to require them to be determined in terms of Rule 14 at that stage frustrates an important purpose that underlies the Act (i.e. that disputes should be resolved expeditiously with the minimum of formality) and potentially opens the door to multiple jurisdictional challenges and piecemeal applications for review.

[21] In summary: despite the initial indication that the NUM accepted that the dispute should be categorised as a dismissal for participation in a strike and that the matter should be referred to the Labour Court, the third and fourth respondents have, in their opposition to this application, clearly indicated a contrary intention. They wish the dispute concerning the third respondent's dismissal determined on the basis that having been on sick leave on the day of the strike, he does not know the reason for dismissal. They wish their dispute to be arbitrated in the CCMA. The case brought by the third and fourth respondents must stand or fall on that basis. The certificate issued by the commissioner has no legal significance beyond stating that as at 8 August 2008, a dispute concerning the alleged unfair dismissal of the third respondent referred to the CCMA for conciliation, remained unresolved. It is common cause that to this extent, the certificate correctly states the facts. Whatever further indications the commissioner

gave as to the nature of the dispute or the forum in which it should be determined, are of no legal significance or consequence.

[22] There is therefore no basis on which the commissioner's conduct constituted a reviewable irregularity, nor is there any basis for the certificate of outcome to be reviewed and set aside. This application must accordingly fail. There is no reason why costs should not follow the result.

I make the following order:

1. The application is dismissed, with costs

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing: 17 June 2009.
Date of judgment: 03 July 2009.

Appearances:

For the applicant: Adv L Hollander
Instructed by: Leppan Beech Inc.

For the respondent: Adv LM Malan
Instructed by: CN Phukubje Attorneys.

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE. YES/NO.
(2) OF INTEREST TO OTHER JUDGES. YES/NO.
(3) REVISED.
02/06/2010 DATE
SIGNATURE

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

LAC CASE No.: JA 51 / 09

In the matter between:

GEORGE MIYAMBO	Appellant
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER TIMOTHY BOYCE N.O.	Second Respondent
PRETORIA PORTLAND CEMENT COMPANY LIMITED	Third Respondent

JUDGMENT

PATEL JA

Introduction

[1] The appellant, Mr George Miyambo ('Miyambo'), with the leave of the court *a quo*, appeals against the judgment and order handed down by the Labour Court. Jammy AJ reviewed and set aside the award made by the Second Respondent ('the Commissioner') and substituted the award with an order that the dismissal of Miyambo by the Third Respondent, Pretoria Portland Cement Company Limited ('the Company') was procedurally and substantively justified and fair and ordered Miyambo to pay the Company's costs. The Commissioner had found that the dismissal of Miyambo was unfair because a fair reason for dismissal had not been proved by the Company. Accordingly, Miyambo was reinstated to his former position with the Company.

The Facts

[2] Miyambo was employed by the Company on 30 April 1982 and had at the time of his dismissal a clean record. On 12 October 2007, whilst Miyambo was on the night shift duty, he found scrap metal which had been thrown into a skip. He was at all material times aware that the scrap metal was not going to be thrown away but rather that it would be sold by the Company. Miyambo decided to help himself to the scrap metal with the aim of fixing his stove. After he had finished his duty a security guard, who was on duty at the Company's pedestrian gate, found a few pieces of scrap metal in Miyambo's bag during a routine search. According to Company policy, a clearance permit or 'pass-out' is required for the removal of company property. This fact was well known to Miyambo because he had on previous occasions obtained the permission of

the Company when he removed property belonging to the company.

[3] Miyambo could not produce the necessary pass-out allowing him to remove the scrap metal. On 16 October he was suspended from his duties and handed a notice to attend a disciplinary enquiry. Miyambo was at a subsequent disciplinary enquiry charged with theft of scrap metal and found guilty. A recommendation of dismissal was made by the chairperson of the disciplinary enquiry and the Company adopted the recommendation and dismissed Miyambo. His subsequent appeal was unsuccessful.

The Arbitration

[4] Miyambo referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ('CCMA'). Conciliation was unsuccessful and the dispute was arbitrated before the Commissioner. The Commissioner found that Miyambo was guilty of theft of scrap from the waste bin. The Commissioner, however found that the sanction of dismissal was unduly harsh and unfair. The Commissioner ordered the Company to reinstate Miyambo with retrospective effect to the date of his dismissal, without forfeiture of any benefits that accrued to him had he not been dismissed, save that he was not to receive any back pay. The Commissioner substituted the dismissal with a sanction of a final written warning valid for one (1) year.

The Labour Court

[5] Subsequent to the award, the Company approached the court *a quo* to have the award reviewed and set aside in terms of s145 of the Labour Relations Act 66 of 1995 ('the Act'). The Labour Court found that the conclusions drawn by the Commissioner were not rational because they were irreconcilable with his factual findings. The Court did not refer to *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC), which is authority for the proposition that a commissioner exceeds his or her powers if the arbitration award is not justifiable in relation to the reasons given for it.

[6] The court *a quo* noted that the Commissioner made two important factual findings. The first is extracted from the Commissioner's award:

> '4.2.1 In the present matter the employee gave 3 contradictory explanations regarding his failure to obtain the pass-out for the scrap metal in question, viz:
>
> 4.2.1.1 on the day of the incident (12 October 2007) he told the security guard (Ngcobo) that he had forgotten to get a pass-out;
>
> 4.2.1.2 at his disciplinary hearing, the employee claimed that he did not get a pass-out since his supervisor was not present;
>
> 4.2.1.3 during the Arbitration he argued that he never believed that he even required the pass-out for the scrap metal in question.'

The other finding was that Miyambo knew he had to obtain a 'pass-out' before he could remove the scrap metal. Consequently, the Commissioner was 'satisfied' that Miyambo was guilty of theft.

[7] The court *a quo* also noted that despite this finding the Commissioner concluded that dismissal was inappropriate and that a continued employment relationship would not be intolerable. Jammy AJ held that this decision was not one that a reasonable decision-maker could have reached.

The Appeal

[8] Before us it was conceded that Miyambo was properly convicted of theft by the Commissioner and that procedural fairness was not an issue. However counsel for Miyambo submitted that although the Company's Disciplinary Code provided for dismissal for theft, it also provided for a final warning. He further contended that the Company failed to prove that it always imposed the sanction of dismissal for theft. It should have imposed a final warning instead of dismissal in light of his long service and clean record.

[9] It was also submitted that on previous occasions Miyambo had been allowed to remove the Company's scrap metal and it was likely that he would have been permitted to remove the scrap metal had he requested permission. Counsel proceeded to draw a

distinction between theft in the 'technical sense', which he defines as the absence of prior permission or unauthorised possession, and theft in the 'strict sense'. According to counsel, Miyambo was guilty of the former. Counsel also submitted that the present matter was distinguishable from cases dealing with 'outright theft'.

[10] Counsel acting on behalf of the Company, submitted that Miyambo's dishonesty destroyed the trust relationship. In this regard it was submitted that Miyambo provided contradictory explanations for unauthorised removal of the scrap metal and made no attempt to comply with the Company's rule despite knowing about it. A reasonable commissioner could not have arrived at the same result as the Commissioner.

[11] It was also argued on behalf of the Company that it applied a consistent zero tolerance policy. In the present matter, corrective discipline would have achieved nothing in light of Miyambo's persistent denial of any wrong doing. Miyambo was adamant that he did not need a pass-out despite knowing the rule, which further militated against a reinstatement. It was argued further that the Company was under an obligation to apply the disciplinary rules consistently.

[12] The leading authority on the standard of review of arbitration awards is *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC). At para 79, Navsa AJ explained the duties of a commissioner as follows:

> 'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

Navsa AJ proceeded to frame the question for determination as follows: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?

[13] It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust. In *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC) para 22, the court, per Conradie JA, held the following regarding risk management:

> 'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[14] In *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 9 BLLR 838 (LAC) para 21 the court quoted this dictum with approval. In *Shoprite*, the employee consumed company property without

paying for it. The court held that the employee's dismissal was fair as the company's rules had been implemented for justifiable operational reasons.

[15] In *Toyota SA Motors (Pty) Ltd v Radebe and others* [2000] 3 BLLR 243 (LAC) para15 Zondo AJP (as he then was) stated;

> 'Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty.'

[16] In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others* [2008] 3 BLLR 241 (LC) the company had a policy allowing its employees to purchase scrap products from it. The employee did not comply with the specific procedure and dispatched a sealed box containing company property. At para 42 Molahlehi J held:

> '...the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.'

[17] It is clear from the above authority that our courts place a high premium on honesty in the workplace. Miyambo gave three different versions as to why he was not in possession of a pass-out. He showed no remorse despite having made an earlier statement saying he was sorry and admitting guilt. Before the arbitrator he did a complete *volte face* and stated that he did not need a pass out for the scrap metal. This was inconsistent with not only what he had said previously but also with what he had done previously when taking out the Company's property which had no commercial value to the Company. He was aware that the scrap metal was being sold by the Company and to that extent it had a commercial value to the Company.

[18] It was also argued on behalf of Miyambo that he did not really intend to steal the scrap metal since he was carrying it in a bag. The guard at the pedestrian gate would have easily discovered the scrap metal if he had searched Miyambo. In my view this is a makeweight argument. The discovery *vel non* was dependant on the vigilance of the guard. In any event if Miyambo did not intend to steal, he *mero motu*, could have gone up to the guard and informed him that he had scrap metal without the necessary pass-out and that he would furnish one later. Instead he informed the guard that he had forgotten to get a pass-out.

[19] It is appropriate to return to the submission made by counsel on behalf of Miyambo that the above case law, which, in his opinion, involves 'outright theft and/or dishonesty', is distinguishable from the present matter which involves theft in the 'technical sense' in

that there was absence of prior permission or unauthorised possession. I do not agree with this argument. It is an artificial distinction and undermines conceptual clarity. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v NUM & Others* [2001] 3 BLLR 305 (LAC) the employee was charged with theft or unauthorised possession of company property, namely cooked meatballs, and was dismissed. The commissioner in his award held that the dismissal was fair. The Labour Appeal Court held that it was clear that the commissioner had failed to appreciate the difference between theft and attempted theft in that the latter was "mildly" less heinous than theft and set the award aside. On appeal this court paid short shrift to this distinction and held that it was clear that the commissioner had found the employee guilty of misconduct and dismissal was therefore justifiable.

[20] I must add that counsel for Miyambo also equated theft in the 'technical sense' with negligence, which adds yet another dimension to an already complex minefield of distinctions. To my mind, a disciplinary procedure that draws subtle distinctions between degrees of theft, and likens the lesser or 'technical' sort of theft to negligence, is impractical.

[21] Miyambo undoubtedly breached the relationship of trust built up over many years of honest service. The Company had a consistent policy of zero tolerance for theft and this had been clearly conveyed to all the employees including Miyambo. I agree with the Labour Court's ruling that the Commissioner's award was not justifiable in relation to the reasons given for it. On the basis of the

factual findings made by the Commissioner, the dismissal of the Appellant was justified for operational reasons and was fair.

[22] I now turn to the question of costs. Miyambo was armed with an award in his favour from the Commissioner. In light of the judgment in *Sidumo* (supra) it was not unreasonable for Miyambo to consider that he had prospects of success on appeal. In my view justice would be best served if each party was ordered to pay its own costs on appeal.

Order

[23] I accordingly make the following order:

(i) The appeal is dismissed.

(ii) Each party is ordered to pay its own costs occasioned by the appeal

PATEL JA

I agree

McCALL AJA

I agree

HENDRICKS AJA

Appearances:

For the Appellant/s:	ADV L M MALAN
Instructed by:	Finger Phukubje Incorporated
For the Respondent/s:	ADV. W HUTCHINSON
Instructed by :	Fluxmans Incorporated
Date of judgment:	2 June 2010