

Sneller Verbatim/MB

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J217/00

2001-06-28

In the matter between

THEMBA MAHLANGU

Applicant

and

THE COMMISSION FOR CONCILIATION,

1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent

IMPUNZI COLLIERIES DIVISION

3<sup>rd</sup> Respondent

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J U D G M E N T

Delivered on 28 June 2001

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REVELAS J:

- 1.This is an application for the review of an award made by the second respondent, a commissioner appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of which it was found that the applicant's dismissal by the third respondent was fair.
- 2.The applicant now seeks to set this award aside in terms of Section 145 of the Labour Relations Act 66 of 1995, ("the Act"). The award is dated 29 November 1999.
- 3.The applicant was dismissed on 9 April 1999 following a disciplinary inquiry at which he had been found guilty of misconduct on the charge of "assisting in the theft of coal". In his arbitration award the

commissioner referred to certain circumstantial evidence led by the third respondent, and came to his conclusion that the dismissal was fair on that evidence.

4.The evidence mainly refers to three trucks which were apprehended in the act of loading coal from the stockpile nearby the foreman's office. The applicant was the foreman in question. One of the trucks, a Khumatsu 500, which was warm, was found parked outside the applicant's office. The third respondent argued that the most probable inference to be drawn, from the uncontested facts, was that the applicant was aware of the use of a Khumatsu loading truck in the loading of coal during the commission of theft. This is so because the truck was warm, whereas the front end loader which was to be utilized to load coal in the normal course, the other front end loader was cold. The commissioner found that the applicant participated in the coal theft.

5.Much of the evidence was attacked in the applicant's grounds of review. The main allegation levelled against the arbitrator is that he did not come to a logical conclusion based on the evidence before him, and that the conclusion was not rationally connected to the evidence before him. The other grounds of review are generally in the form of grounds for appeal.

6.What is most important in this matter is that the applicant himself never gave evidence. Certain versions were put to witnesses on his behalf, and in those circumstances, in my view, it was entirely appropriate and open to the second respondent to draw certain inferences.

7.Counsel on behalf of the third respondent conceded that the evidence lead in this matter in order to prove the charges, may have been "skimpy", as he puts it, but once the applicant did not give evidence, it became a strong case. This is indeed so.

8.Furthermore, the inquiry is not whether I, when hearing the same evidence

would have come to a different conclusion. The test is whether the arbitrator on the evidence before him, came to a conclusion which is rationally connected to the facts. On that basis I do not believe I can interfere.

9. Furthermore, much was made of the type of evidence on which the second respondent based his conclusion. I want to make the point that there was an employment relationship between the third respondent and the applicant. It was not a matter of the applicant being a total stranger in a criminal court where the case against him had to be proved beyond reasonable doubt. (See: *Council for Scientific and Industrial Research v Fijen* 1996 17 ILJ 18A at 26 E, and *Chauke & Others v Lee Service Centre trading as Leeson Motors* 1998 19 ILJ 1441 LAC at 1447 paragraphs 32 to 33).

10. An employee in the position of the applicant would clearly be under an obligation to prevent the theft of coal, and indeed to report such a theft to his employer. The applicant's failure to take his employer into his confidence was clearly indicative of guilty knowledge on his part.

11. The applicant alleged that the keys of the truck were missing. It appears that the arbitrator rejected this version for reasons that I cannot interfere with.

12. In the circumstances I make the following order:

1. The application for review is dismissed with costs.

2. The matter is referred back to the CCMA for hearing before another arbitrator.

Applicant: Mr Mohlaba of Mohlaba and Moshoana Inc Attorney

On behalf of the respondent: Adv C E Watt-Pringle, instructed by Denyes Reitz of Sandton.

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E. Revelas