IN THE LABOUR COURT OF SOUTH AFRICA

(Held in Johannesburg)

Case No JR1438/01

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED (RUSTENBURG SECTION)	Applicant
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	1st Respondent
LEBEA J N, NO	2nd Respondent
WORKERS RIGHTS ASSOCIATION	3rd Respondent
RAMOSEPELE L	4th Respondent
BINGLE M	5th Respondent

JUDGMENT

STELZNER AJ

This is an application in terms of section 145(2)(a)(i), (ii) and (iii) of the Labour Relations Act of 1995 ("the Act") in terms of which the Applicant seeks to review and set aside the arbitration award of the 1st Respondent. The award was dated 12 July 2001 and came to the attention of the Applicant on 10 August 2001 on which date it was faxed to the Applicant. The review was delivered on 28 September 2001, one week outside the time provided for in section 145 of the Act. There was no opposition to condonation being granted for this lateness and condonation was accordingly granted, so that the matter could proceed on the merits as requested by both parties.

The matter concerns the dismissal of the 4th and 5th Respondents for "falsifying records and ineffectiveness (poor quality of work)". The 4th Respondent had been employed by the Applicant since January 1978 and the 5th Respondent since 17 August 1984 and they were both senior surveyors. The dismissals were found by the 2nd Respondent to be both procedurally and substantively unfair and the Applicant was ordered to reinstate them and to pay them compensation in the amount of 10 months salary. Applicant seeks to review this award on the basis that the 2nd Respondent:

1. failed to apply his mind properly,

2. misconducted himself,

3. committed one or more gross irregularities, and/or

4. exceeded his powers by acting unreasonably and unjustifiably in

    4.1 failing to consider relevant and admissible evidence placed before him,

    4.2 failing to assess the evidence and argument presented to him, weigh the probabilities, and have regard to the credibility of the respective witnesses, and

    4.3 finding in the absence of such assessment and evaluation, that 4th and 5th Respondents had innocently misrepresented the results of their surveying activities.

In order to understand the offence for which the respondents were charged and the evidence on the issues some background information is required. One of the functions of the respondents was that they were required to survey ore removed from a mine underground and, specifically, to measure the quantity of ore that had been removed

from the underground workings. This task involves measuring results which have been plotted on a plan / map with the use of an electronic device known as a plinning metre or plinometer. The task itself is referred to as 'plinning'. Plinning is done by taking measurements on a map on which results of the underground workings have already been recorded.

The information obtained from plinning is used by the Applicant for various purposes. For example, the information is used by the sales people as a guide to establish how much platinum will be available for sale by the Applicant to its overseas customers. The information is also used to work out payments and bonuses to contractors who perform the excavation work. It was thus common cause that it was very important to the Applicant that the plinning was done accurately. An overestimation of the amount of ore that was being removed from the mine could result in contractors being overpaid and in wrong estimates being given to customers.

The respondents were senior surveyors, as mentioned previously. It was common cause that they had worked for the mine for a long time, had been trained, held the necessary qualifications and were well acquainted with the use of the plinometer, which they used on a regular basis.

The respondents were called to answer charges at a disciplinary enquiry after a check was done on their plinning and it was discovered that there were major variances between the measurements they had recorded and the actual square meters of certain surveys. It was established that over a 4 month period (which was how far back the re-plinning was done) the 4th Respondent had over-measured 100% of the time and the 5th Respondent had over measured 95% of the time. The 4th Respondent was out by an overage of 9% and the 5th Respondent by an overage of 17%. At times the over measurements went as high as 32%. Other employees were either within the limit of the standard (see what is said below in this regard) or only out on the odd occasion.

The Applicant's case against the respondents was clearly that they had deliberately over-plinned and that this was not simply a case of poor performance or even negligence. The second charge of ineffectiveness was seen as ancillary to the main charge of falsifying records. Ineffectiveness, said the Applicant, emanates from the falsification of records. The Applicant did not contend that ineffectiveness – or poor work performance – on its own would have justified dismissal. If there had been no intent then Applicant would have treated the issue as one of incapacity.

The 2nd Respondent found that Applicant failed to prove intent and thus failed to prove its case. Regarding ineffectiveness in the sense of poor quality of work he held that this should have been dealt with as incapacity with the correct procedures for incapacity being followed. As this did not happen the dismissals were found to be substantively unfair. The 2nd Respondent also found that the dismissals were procedurally unfair on two grounds. Firstly, he found that the chairman of the disciplinary hearing had not

acted impartially. This conclusion was drawn from the fact that before the hearing commenced the chairman drew up a set of questions for the initiator to ask the respondents at the hearing. Secondly, he found that the appeal chairman did not consider the grounds of appeal (relating to the impartiality of the chairman of the initial hearing) in making his decision on appeal. There was a third ground raised by the respondents which the 2nd Respondent rejected and there is no need to deal with that ground further.

Applicant takes issue with the 2nd Respondent's finding on both procedural and substantive fairness. I deal hereunder with the detailed concerns of the Applicant regarding the 2nd Respondent's award and which form the basis of the grounds of review in this matter.

In order to understand Applicant's contentions and to evaluate the 2nd Respondent's reasoning in relation to the evidence before him, it is necessary to consider in more detail the issue of variance or degree of variance in relation to plinning.

There is a legislative provision which became the subject of much attention in this matter, namely Regulation 13.5.3 of the Regulations promulgated under the Minerals Act 50 of 1991. This regulation provides as follows:

> "*In the event of the measurement of the manager's surveyor, as appearing in the cost sheet, and the check surveyor, after making an adjustment for the ground broken in the interval between 2 measurements, differing to the extent of 3%, or less of the measurements of the check surveyor, the mean of the two measurements shall be taken to be the correct one and payment shall be made thereon. In the event of the 2 measurements differing to a greater extent than 3%, if a compromise cannot be arrived at the matter shall be referred for decision by the Chief Inspector who shall have the right of calling for the production of survey notes, calculations and plans of both the manager's surveyor, and, if necessary, of making an independent survey, and whose decision as to the actual amount of work done and to be paid for shall be final.*"

No-one contended that the regulation applied on all fours to the instant case. Applicant's case, however, was that the 3% deviance standard as reflected in the regulation was the acceptable amount of leeway generally applied in the industry and that it had made that the standard within its own business. In other words, Applicant contended that the 3% standard had been adopted by it as the standard in the workplace. It contended further

that this standard had been communicated to its staff (including the 4th and 5th respondents) in training and in monthly staff meetings. Its witnesses led evidence to this effect. It also contended that it was ludicrous to suggest that a business of its size and sort would have been conducted without the imposition of any standard for surveyors to work to, as contended for by the respondents.

The Applicant's case was thus that there was a rule or standard in the workplace which had been consistently breached by the respondents. It further contended that because these were senior, trained and experienced surveyors, and because of the fact that they consistently over-plinned and by a large margin for a period of at least 4 months, the only inference to be drawn was that they were deliberately over-plinning. If there had been only negligence or a problem with the equipment one would have expected variance both under and over the norm and also one would not have expected consistent variances on every piece of work surveyed. Thus, said Applicant, it had proved its case of intent to falsify on the basis of the probabilities and inferences to be drawn from the facts that it had proved. There was no evidence that the respondents had benefited in any way from the regular over measurement by them. Applicant relied simply on making the point that they could have benefited (for example they could have been getting kickbacks from the persons who did stand to benefit from over measurement). Thus Applicant's case on this leg was simply that there was a possible motive for over-plinning, not that it had proved anything in this regard.

The 2nd Respondent found that the regulation itself did not establish a rule for the Applicant's workplace, nor did it indicate that it was an offence or misconduct for surveyors to measure outside of the 3% norm. He also found no reference in the Applicant's disciplinary code to an offence involving over- or under-plinning with reference to the 3% norm. He found therefore that the Applicant had failed to prove that is was an offence or misconduct to exceed the limit of 3% in measuring. He then went on to consider whether Applicant had made out a case against the respondents for falsifying records. To do so he held that he would have to find intention to defraud which implied knowledge that they were falsifying a document. In this regard the 2nd Respondent found that merely recording false or incorrect information on a document does not amount to falsification of the document. The respondents could simply have been negligent. The 2nd Respondent refers to Applicant's argument that the intention to falsify could be inferred from the facts but simply reiterates that the respondents could simply have been negligent.

Another aspect which weighed heavily with the 2nd Respondent was the checking of plinning done by the respondents. The evidence was that Applicant's system required that another employee check the plinning done by the surveyors who did the job first and then that the checker sign to indicate that the checking had been done. In this matter one Mr Tjale was the checker but it became common cause that he did not check – he simply signed the documents reflecting that he had done so when he had in fact not. Mr Tjale's evidence was that he did not check the surveying of 4th and 5th Respondents

because they were senior surveyors. The 2nd Respondent viewed Mr Tjale's function as a form of quality control which had failed because Mt Tjale did not do what he was supposed to do. However, said the 2nd Respondent, the 4th and 5th Respondents could not be blamed for the fact that their work was not checked, in fact this meant that they were not alerted to their 'mistakes'. This reasoning fails to have regard to the Applicant's case which was that the respondents were deliberately underplinning.

The issue which I am called upon to decide is whether or not in reaching the decision he did, the 2nd Respondent committed a reviewable irregularity / failed to properly apply his mind to the issues and evidence before him such that I should set aside his award.

The main thrust of the Applicant's case in this regard is that the 2nd Respondent misconstrued the nature of the evidence and the Applicant's case against the 4th and 5th respondents. I am of the view that this contention is well founded. The 2nd Respondent appears to have become distracted by Regulation 13.5.3 which is clearly in the form that it is drafted not directly applicable to the issue at hand. However, the 2nd Respondent fails to take account of the evidence of Applicant's witnesses to the effect that the 3% norm as generally contemplated in the provisions of the Regulation had been made the norm or standard at the Applicant's workplace for surveying. The fact that Applicant did not reword the regulation into an appropriate from or explicitly set out the details of the rule in its disciplinary code misses the point and ignores all the evidence of Applicant's witnesses to the effect that not only was it the standard but it was well known and well communicated. The reviewable irregularity lies in only asking the question in terms of the Regulation and whether the respondents were bound by the Regulation. What the 2nd Respondent should have been asking itself was has the Applicant made out a case that it trained and informed the respondents that they needed to plin within the 3% error margin. There was more than sufficient evidence from the Applicant's witnesses to that effect.

The 2nd Respondent also misses the point that the respondents were not charged with breach of a rule – they were charged with falsification of records. It was common cause that the records were false / incorrect. While it is correct that intent needed to be proved in this regard the 2nd Respondent fails to appreciate that the inferential line of reasoning argued for by the Applicant on the probabilities was entirely sustainable on the facts and on a balance of probabilities – especially the fact that there was almost 100% consistent over-plinning by the respondents over a 4 month period when they were both senior and experienced surveyors and given the absence of any attempt by the 4th and 5th respondents to put up an explanation for the consistent over measurements by them.

Further the 2nd Respondent places undue weight on the failure by Mr Tjale to check the plinning of the respondents, especially as the evidence was that the rule on checking was one which was observed mostly in the breach. In any event, the evidence was that it was the 4th and 5th respondents as the main surveyors who had the primary responsibility not only to plin correctly but to ensure that they were checked. (As an aside it is worth making the comment here that a rule requiring checking would be nonsensical in the absence of a standard against which such checking should take place.)

What is further missing in the 2nd Respondent's award is reference to the credibility of the 4th and 5th respondents. This is an inexplicable omission since the 2nd Respondent on occasions found the respondents to be evasive when giving evidence. See for example page 496 of the record from line 14 where the 2nd Respondent says, *inter alia,* "*I am becoming irritated with his evasiveness, what I regard as evasiveness, I am becoming concerned".*

On the issue of procedural fairness the only evidence / suggestion of wrongdoing was the fact that the chairman of the disciplinary hearing wrote out a series of questions which he handed to the initiator before the hearing. The initiator asked some but not all of the questions on the document. There is no evidence to suggest that the chairman was in fact biased or impartial in any way. He could simply have been trying to ensure that all the relevant issues were properly canvassed at the hearing. There was nothing sinister or unusual about the questions themselves. Applicant argued, and I agree, that the 2nd Respondent elevated this issue to a level which was not justified having regard to the fact that what was at issue here was the fairness of an internal disciplinary hearing .

The second leg on which the 2nd Respondent found procedural unfairness was that the chairman of the appeal hearing did not deal properly with the grounds of appeal pertaining to the chairman's pre-involvement in the case. What the appeal chairman did was to say that in his view the respondents had been provided with a full and proper opportunity to state their case, call witnesses and cross-examine the complainant. Furthermore, no irrelevant questions were put. In my view this does not indicate that the chairman of the appeal failed to address the grounds of appeal. He did and concluded that the respondents had been given a fair hearing. That is, after all, what the law is designed to ensure. The 2nd Respondent appears thus to have not taken proper regard of the evidence before him on this issue.

On the issue of procedural fairness as a whole I am of the view that the 2nd Respondent became distracted by technical niceties and thus failed to apply his mind to what is required by the Act as read with the Code of Good Practice, which is not a formal process reminiscent of that conducted in a court of law but a fair opportunity for the employee to state his case.

In the circumstances I am satisfied that a proper case has been made out for review of the award of the 2nd Respondent. This is not a case where Applicant has argued that the 2nd Respondent was wrong in his decision. Applicant has made out a case to the effect that large sections of evidence and argument have not been taken into account. Rather the 2nd respondent has based his decision on a limited apprehension of the evidence and has in certain instances ignored contrary evidence. This amounts to a gross irregularity and means that a fair trial was not achieved. The award is also not rationally connected to the material which was before the 2nd Respondent in the sense of the test applied in *Carephone (Pty) Ltd v Marcus NO & Others* [1998] BLLR 1093 (LAC) especially in regard to the manner in which the 2nd Respondent dealt with the connection between and relevance of Regulation 13.5.3 and the standard applied by the Applicant in the workplace regarding surveying.

This is not a case where I am in a position to substitute a decision for the award of the 2nd Respondent nor is such an order sought.

Both parties agreed in argument that this was a matter in which costs ought to follow the result.

I therefore make the following order:

1. The arbitration award made by the 2nd Respondent on or about 12 July 2001 is reviewed and set aside.

2. The matter is to be referred back to the 1st Respondent for arbitration *de novo* by a commissioner other than the 2nd Respondent.

3. The 4th and 5th Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

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STELZNER AJ

Date of hearing:	14 April 2005
Appearance for the Applicant:	Mr A Snider instructed by Leppan BeechAttorneys
Appearance for 4th and 5th Respondents	Mr instructed by Cheadle Thompson and Haysom (4th respondent) and by Erasmus Prokureurs (5th Respondent)
Date of judgment	22 April 2005