IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 716/01

In the matter between:

DUIKER MINING LTD.
TAVISTOCK COLLIERY **APPLICANT**

AND

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **1ST RESPONDENT**

S MALAZA N.O **2ND RESPONDENT**

Q. JUBEJU **3RD RESPONDENT**

NATIONAL UNION OF MINEWORKERS **4TH RESPONDENT**

JUDGMENT

NTSEBEZA, A.J

BACKGROUND

[1] Duiker Mining Limited, the Applicant, is a coal mining company which has, for the purpose of these proceedings, an operating Division at Tavestock Colliery. One of the Applicant's employees, Qalisile Jubeju, the Third Respondent herein (hereinafter referred to

as "the employee", and a member of the National Union of Mineworkers, the Fourth Respondent (hereinafter referred to as "the Union") was dismissed by the Applicant ("the employer") on or about the 15 September 2000.

[2] He had been found guilty of assaulting a fellow employee. The employee challenged the fairness of his dismissal and that dispute was referred to the Commission for Conciliation Mediation and Arbitration, the First Respondent("the CCMA") in terms of S.191 of the Labour Relations Act, 66 of 1995("the LRA"). The conciliation process having failed, the matter was arbitrated by the CCMA which used the services of Mr. Malaza, the Second Resopondent, as Commissioner("The Commissioner"). The Commissioner heard the matter on the 5th March 2001 and his award of the 20th March 2001 was apparently served on the employer by the CCMA on the 26th of April 2001.

[3] The Commissioner effectively reversed the dismissal of the employee by the Employer, it being his finding that he was not convinced that the alleged assault took place. He reinstated the employee, ordered him to return to work on the 2nd May 2001. He also ordered retrospective compensation for 7 months, in the sum of R8701-00 calculated at the rate of R1243-00 per month,
R1243-00 having been the employee's salary at the time. These proceedings are a resistance by the Employer of that award.

[4] The employer resists the award on the basis that the Commissioner completely misconstrued the grounds on which the employee was

dismissed; that the Commissioner ignored important corroborative medical evidence that confirmed that the extent of the injuries on the victim of the employee's assault, one Seloga, were consistent with an assault; that had there been a proper evaluation of the evidence by the Commissioner, he would have concluded that there had been an irretrievable breakdown in the employment relationship between employer and employee as a result of the assault incident, a serious act of misconduct, and that any reinstatement order was inappropriate.

[5] The employer's case, certainly in its founding papers, was, therefore, that the conclusion reached by the Commissioner that there had been no assault because the employer had failed to prove that the employee was directly involved in the incident was not legally justified. Had the evidence been properly evaluated, the employer said, the Commissioner would have concluded that the employee had assaulted Seloga, in the presence of a number of fellow employees, without being provoked, hence that justified a dismissal.

[6] That the Commissioner had misconstrued the evidence, according to the employer, was evidenced by the fact that he confused the date of the incident, the 31st of May 2000; the fact that he characterized a grievance hearing on the 7th and 8th June 2000 as a disciplinary enquiry; his failure to appreciate that the delay in instituting disciplinary proceedings was because one Ms Perfetti was still investigating and the employee himself was on leave. [I think the employer meant Seloga]. The period of delay(3 months) was also misconstrued as 5 months by the Commissioner.

THE ISSUES

[7] According to the employer, on 31 May 2000, it had received reports of an assault by the employee on one Seloga on the basis of which it had instituted a grievance hearing. The employer alleges that it uses this mechanism to gain a *prima facie* view of whether a formal disciplinary hearing is competent, especially in assault cases. The employer says the grievance hearing "follows a similar format to a disciplinary enquiry". The difference is that in a grievance hearing, the chairperson thereof makes a recommendation with regard to any need for disciplinary proceedings that might follow.

[8] In this case, such grievance hearing took place on the 7th and 8th June 2000 and no recommendation for a disciplinary hearing was made by the chairperson of the grievance hearing. He made no factual findings though he had investigated the issue. The Applicant, on promptings from the Mineworkers Union that claimed the matter had not been properly investigated and that there was evidence that a disciplinary enquiry should have been held, then investigated this alleged assault incident. This investigation, ("the second investigation") by one Ms Perfetti recommended a disciplinary hearing. This was instituted on 31 August 2000-three months after the alleged assault incident. The only explanation for this delay was that Seloga was away for a month on annual leave.

[9] The employee was advised to attend on the 24th August 2000 to answer a charge of having assaulted Seloga. The employee refused

to participate at an adjourned hearing on the 29th August 2000. The hearing took place in his absence. The employee was found guilty of assault in his absence and was dismissed.

At an appeal hearing on 4 September 2000, the employee advised that he had been disciplined at an enquiry on 7th and 8th June 2000 and had been found not guilty of assault. At this appeal hearing, the one person who would have been expected to be called, one Jeffries, who had conducted the grievance hearing, was not called. Instead, the employer called one Van der Westhuizen, to testify about the events of 7th and 8th June 2000. No explanation has ever been given why Jeffries was not called at the appeal hearing.

[10] The employee's appeal was dismissed on 10 September 2000, and that led to the arbitration as stated above.

En passant, I need mention that the Founding Affidavit of the employer is peppered with a lot of allegations that claim that the Commissioner made contradictory findings; the claim is made, for example, that the Commissioner made the following contradictory findings: "on a balance of probabilities, an assault took place…" and "The Company failed to prove to the Commission that Jubeju did assault Mashaba Seloga…"

[11] The Commissioner made no such contradictory findings. The Commissioner was merely recalling, in each case, evidence and argument as he understood it. In fact, these so-called "contradictions" appear in the award under the heading "SURVEY OF EVIDENCE AND ARGUMENT". The Commissioner's findings appear clearly under the heading "ANALYSIS OF EVIDENCE AND ARGUMENT". The premise on which the

employer's case is built, in so far as it may rely on these so-called contradictions, is therefore shakey and without substance.

[12] Mr Van As, who appeared for the employer, submitted that there was only one issue for consideration, and that was whether the dismissal was substantively unfair. His argument is that against the direct evidence of assault, from the victim, from the medical report, from eye witnesses, particularly from Thabethe, who, Mr Van As argued was a third party witness who had seen the employee hitting the victim with a Tommy-bar, from one Da Silva about a contemporaneous statement to him that the victim had been assaulted by the employee and the common cause fact that there had been an altercation between the two, one has only a bare denial from the employee.

[13] Mr Van As argued that the Commissioner should have applied his mind to these facts because they constituted overwhelming evidence. Mr Van As is of course wrong in saying the response from the employee is a bare denial. The employee led Khoza's evidence that clouded the issue inasmuch as it did not support the victim's version about the assault. At any rate Mr Van As's argument was that the overwhelming evidence against the employee at the arbitration is such that a finding other than guilty of assault was unimaginable and could not be legally and rationally justified. The Commissioner should have concluded, on a proper assessment of the evidence, that the employee had been dismissed for a valid reason.

[14] It was not for the Commissioner, in concluding that the employee did not assault Seloga, to appear to take the following factors into account:

- the delay in instituting disciplinary proceedings;
- the fact that the Commissioner held it against the Applicant that the Applicant relied on a balance of probabilities for arguing for the finding of guilt against the employee;
- the authenticity of the medical report.

[15] To rely on these grounds for coming to the conclusion that the employer had failed to prove that the employee had assaulted Seloga was not legally justifiable.

See: **Carephone(Pty)Ltd v Marcus N.O and Others**(1998) 19 ILJ 1425 (LAC);

Shoprite Checkers(Pty)Ltd v Ramdaw N.O and Others (2000) 21 ILJ 1232 (LAC);

Shoprite Checkers(Pty)Ltd v CCMA and Others 1998 (19) ILJ 892 (LC) at 900D-G;

Kynoch Feeds(Pty)Ltd v CCMA and Others (1998) 4 BLLR 384 (LC) at 393J-394B

[16] I agree. The conclusion of the Commissioner in its award follows an analysis of the evidence in which he made the following remarks:

- a hearing had taken place on 7th June 2000 in which "**the chairperson of the first hearing Mr Van der Westhuizen did not find Jubeju[the employee] guilty!**"

- even though the employee had testified that one Choma,

at the 7 June hearing had testified that he had not seen the employee assaulting Seloga, at the arbitration hearing the self-same Choma had implicated the employee;

- only his witness, Khoza, testified that he did not see the

assault taking place;

- the Company (the employer) had contravened its own code by not conducting a hearing within 3 days in a case of misconduct;
- it was an irregularity for the hearing to be conducted 3 months after the date of the incident;
- once an employer had established that an employee is guilty of misconduct, disciplinary proceedings should be brought within a reasonable time, since an excessive delay may result in an employer being estopped from dismissing an employee.

The Commissioner, without saying why he said so in the light of the evidence before him, and ostensibly because of the above considerations, came to the sudden conclusion, "**I am therefore not convinced that Jubeju did assault Mashaba Seloga**".

[17] Even under the heading "AWARD", and where the Commissioner reiterated this finding in as many words, he did not at all deal with the evidence and the veracity thereof with regard to the assault. He reiterated his disquiet with the period of delay from the time of the incident to the time of the disciplinary hearing as "**rather too**

long"; that the company contravened its own disciplinary codes; that there were "**suggestive premises**" that the Company had not been able to establish whether the assault had taken place, hence the delay in bringing disciplinary action, one of the "**suggestive premises**" being "**substantiated by the fact that at the initial inquiry the then chairperson, Mr Van der Westhuizen could not find [Jubeju] guilty of assault**"; that the hearing should have "**been done timeously**" so "**facts are still fresh in the minds of the parties**". Relying on Miksch v Edgars Retail Trading(Pty) Ltd (1995) 16 ILJ 1575 (IC), the Commissioner seemed to recall with approval the sentiment expressed therein that an employer who delays to discipline an employee where a contravention of company rules had been established may also be deemed to have waived its right to dismiss for charges alleged.

[18] The Commissioner further relied on Professor John Grogan's WORKPLACE LAW, 5th Edition, p.64 for an averment that "**once an employer has established that an employee is guilty of misconduct, disciplinary proceedings should be instituted within a reasonable time. If an excessive delay occurs, the employer may be estopped from dismissing the employee**."

This is all commendable. The question is whether it is a basis for the Commissioner to conclude, in the light of direct and corroborated evidence, that he is "**therefore not convinced that Jubeju did assault Mashaba Seloga**." I respectfully hold that these factors were irrelevant for purposes of arriving at the legally justifiable conclusion as to whether, on the evidence, an assault

took place as alleged and in the light of the evidence led at the arbitration.

[19] It remains for me to consider submissions by Ms Tshabalala. The bulk of her heads is directed at seeking whole paragraphs from, principally, the Replying Affidavit to be ordered struck off. I do not have to decide that. I proceed, in her favour, that the rule in Plascon-Evans Paints Ltd v Van Riebeeck(Pty) Ltd 1984 (3) 623(A) applies here, namely that in the event of a dispute of fact, the decision of the Court is based on the facts averred by the Applicant, and admitted by the Respondent, together with facts alleged by the Respondent. What is the case for the employee?

[20] As it was argued by Ms Tshabalala, it is, simply, that at the arbitration proceedings the victim did not testify; that no reference ought to be made to his version since it comes only through his legal representative, one Weiderman; that the eyewitness's evidence, though corroborative, has no probative value; (Ms Tshabalala actually submitted it should not be taken into account-) that the only evidence, in fact, before me is the evidence of the employee, who denies he ever assaulted Seloga. Ms Tshabalala gave me no authority for the proposition that if a complainant does not testify, the corroborative evidence of eyewitnesses should "**not be taken into account**". I, in any event reject that proposition as having no substance either at common law or in statute. Besides Seloga was the very first eyewitness called at the Arbitration. I therefore do not understand the submission that there is no version emanating from Seloga.

[21] The other basis for attacking the review proceedings by Ms Tshabalala seems to be that the employee had been disciplined on the 7th and 8th June 2000, and his refusal to participate in the proceedings scheduled for 21 August 2000 had been justified because of his belief that he could not be disciplined twice for the same act of misconduct-the so-called double jeopardy defence. The period between the 8th June and 20 July 2000(when Seloga went on leave) has not been accounted for in terms of why the hearing was delayed by the employer. Ms Tshabalala therefore seemed to suggest that the delay was because there was no outstanding issue, the hearing of the 8th June having been finally dispositive of the issues. As far as the incident was concerned, the employee denied there was an assault and Khoza corroborated that version.

[22] As I said, these are very cogent submissions, with which I sympathize. It seems to me, however, that if these proceedings are to review the award of the Commissioner for its rationality and justifiability for legal conclusions the Commissioner arrived at in so far as the conclusion has to be linked to the evidence, it is not possible for one to accept, on the grounds articulated by her, Ms Tshabalala's invitation not to "interfere with the award' and that I should dismiss the review application with costs.

[23] It seems to me there is a lot that the Commissioner could have done to justify his conclusion in a manner that is justifiable and rational and which is evidence of the fact that he applied his mind. I say so without even taking into account some glaring mistakes, like that

the chairperson of the 7th and 8th June grievance disciplinary hearing was Van Der Westhuizen instead of Jeffries.

It may well be that the employee is a victim of double jeopardy if the hearings of the 7th and 8th June 2000 were final, and in the form of disciplinary hearings. I do not know. There are indications it could be either way, given that to the extent I can have regard to evidence that comes only in reply, the proceedings on the 7th June were characterized as "Grievance hearings" and the ones on 8th June as "Disciplinary Hearing". All this did not seem to have been considered or featured at the arbitration hearings. I do not know that. What is clear to me is that the Commissioner's finding that there was no assault cannot be justified by the evidence before him. Whether the other factors he took into account, including the possibility that the employee may be a victim of double jeopardy, do have relevance seems to me to require a further examination. As things stand, and on the basis on which the matter seems to have been arbitrated, the Commissioner's award cannot stand.

[24] For all these problem areas, I do not consider the matter is one in relation to which, having reviewed and set aside the Commissioner's award, I can substitute it with my own decision, nor do I consider that costs should follow the result. In the exercise of my discretion, I will not allow costs to the employer, even though it is in the circumstances here the successful party. I therefore order as follows:-

a) The arbitration award handed down by the Second Respondent on 26 April 2001 is hereby reviewed and set aside

b) The matter is remitted to the CCMA for further

consideration by another Commissioner, if needs be.

c) There is no order as to costs.

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DB NTSEBEZA

Acting Judge of the Labour Court

Appearance:

For the Applicant:

Instructed By:

For the Respondent:

Instructed By:

Date of Hearing:

Date of Judgment: