IN THE LABOUR COURT SOUTH AFRICA
HELD IN JOHANNESBURG

In the matter between:	Case Number: JR911/05
KLOOF GOLD MINE A DIVISION OF GOLDFIELDS MINING SA (PTY) LTD	
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	FIRST RESPONDENT
AHMED CACHALIA NO	SECOND RESPONDENT
UNITED ASSOCIATION OF SOUTH AFRICA	THIRD RESPONDENT
E DE LA HARPE	FOURTH RESPONDENT
JA BOTHMA	FIFTH RESPONDENT
WJ VENTER	SIXTH RESPONDENT
DPJ VORSTER	SEVENTH RESPONDENT
DRS YOUNG	EIGTH RESPONDENT
EG LARSEN	NINTH RESPONDENT
CJ MULLER	TENTH RESPONDENT
JA DELECA	11TH RESPONDENT

JUDGMENT

SANDI AJ

[1] This is a review application in terms of section 145 of the Labour Relations Act, 66 of 1995. The application is opposed by the fourth to the eleventh respondents ("the employees").

[2] The applicant is Kloof Gold Mine. It is engaged in the business of gold mining. The first respondent is the Commission for Conciliation, Mediation and arbitration ("the CCMA"). The second respondent is the commissioner whose award is the subject of these proceedings. The third respondent is United Association of South Africa, a registered trade Union, of which the third to eleventh respondents ("the employees") are members.

[3] The applicant has a clocking policy at its workplace in terms of which every employee is required to clock in when he arrives at work, and clock out when he departs from work. The clocking times would be reflected on the employees' clock cards and served as the basis on which the employees would be remunerated for the work performed by them. The evidence which was led at arbitration, and correctly accepted by the commissioner, was that all the employees knew about the clocking system and that at their induction they were taught about it.

[4] At about 05h11 on 5 March 2004, a security guard employed by

the applicant noticed an employee carrying a number of clock cards and clocking in employees who were not at the clocking machine at that time. This happened at the machine where the employees would normally clock themselves in immediately before they went underground to start their work. It is common cause that two of the employees had not yet arrived at work at the time they were being clocked in. However, the rest of the employees were present on the applicant's premises though they had not commenced their duties.

[5] The employees were charged with fraud. They were all convicted and dismissed from their employment. Thereafter the employees referred an unfair dismissal dispute to arbitration.

[6] After hearing evidence the commissioner found the employees guilty of contravening the applicant's policy relating to clocking. However, the commissioner found that there was no evidence that the employees committed fraud. In the course of the award the commissioner said the following:

> "As pointed out earlier, fraud with regard to clocking cannot be equated with the offence for which the applicants have been found guilty. Whilst it is a serious offence I do not believe that it is so serious that it warrants dismissal.
>
> The applicants have not received any remuneration that they were not entitled to. There is no evidence to suggest that they had clocked in for one another when one of them was not present at work. In essence they had not benefited".

[7] Thereafter the commissioner reinstated the employees to their employment positions and each employee was given a final written warning valid for 12 months.

[8] It is this award that the applicant is attacking in these proceedings

[9] Contrary to the finding made by the commissioner, that there was no suggestion that the employees clocked for one another at a time when one of them was not at work, the evidence led before the commissioner shows that two of the employees (Venter and Bothma) had not arrived at work when they were clocked in.

[10] The information contained in the clock cards represented to the applicant that all the employees who had clocked in had reached their underground work destination at that time, and that they had commenced their work. The discovery made by the security guard showed that the employees were not at work underground, because at the time the employees were sitting in their supervisor's office. They had gathered there to receive their instructions from their supervisor, Mr Venter. Only at 6h00 would the employees go underground, and it would be at that moment that they would be required to clock in.

[11] The employees' case was that clocking in for one another was a practice which had been in existence for sometime and that one Dan Smith, an engineer, was aware of this practice and had condoned it. However, Mr Dan Smith gave evidence denying that

he was aware of the existence of such practice and the evidence tendered by the employees did not show that Mr Dan Smith was indeed aware of it.

[12] The commissioner's finding that the employees must have benefited in order for their actions to constitute fraud is an error of law which led the commissioner to reach a legal conclusion which is not supported by the facts of the case.

[13] In Joubert, the Law of South Africa, vol 6, 2nd edition, paragraph 322, fraud is defined as consisting in the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.

[14] The conduct of the employees was potentially prejudicial to the applicant in that clocking in at the machine intended for employees going underground represented to the applicant that the employees concerned were underground, performing the duties and that they were entitled to payment.

[15] In terms of the applicant's disciplinary code the following offences warrant summary dismissals:

> "Clocking in and out, signing on and off but not arriving at your workplace. Clocking in and out, signing on and off for another employee."

[16] In my view the conduct of the employees falls within the conduct described above and that the commissioner committed a gross irregularity by interfering with the sanction imposed by the applicant. There is a good reason why the said policy is in place: employees must be remunerated for the time that they actually render services to their employer. Clocking in for an employer

who does not turn up for work or arrives late for work would result in financial loss to the company. In the event that there is an accident the employer must be able to establish accurately, with reference to the clocking machine, as to how many employees underground need help.

[17] In County Fair Foods (Pty) Ltd v CCMA & Others (1999) 20 ILJ 1701 (LAC) it was held that:

> "Commissioners must exercise greater caution when they consider the fairness of the sanction imposed by an employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair."

[18] In the light of the above, the commissioner has committed a gross irregularity. He ignored relevant evidence and applied a wrong legal principle. In my view the commissioner's finding is not justifiable in relation to the matters placed before him and falls to be set aside.

In the result the following Order is made:

1. The commissioner's award is set aside and replaced with the following:

   "the dismissal of the 4th (fourth) to 11th (eleventh) respondents was fair"

2. The fourth to eleventh respondents are to pay the costs of this application.

SANDI AJ

COUNSEL FOR THE APPLICANT	: Adv Van As
ATTORNEYS FOR THE APPLICANT	: Messrs Webber Wentzel Bowens
RESPONDENTS REPRESENTATIVE	: Ms Welgemoed (United Association of South Africa)
DATE OF HEARING	: 26 May 2006
DATE OF JUDGEMENT	: 06 June 2006