IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR2337/07

In the matter between:

NORTHAM PLATINUM LIMITED	APPLICANT
AND	
FM FGANYAGO N.O.	1ST RESPONDENT
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	2ND RESPONDENT
NUM obo W MAOPE	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award of the first respondent ("the commissioner") under case number LP3534/04 dated 14th August 2007. In terms of that arbitration award the commissioner found the dismissal of Mr Maope ("the employee") to have been procedurally fair but substantively unfair.

Background facts

[2] The employee who prior to his dismissal was employed as plant operator arose from an incident where he and two other employees were allegedly captured on

a video tape removing platinum metals from the workplace. The employee and two others were identified from the video tape by the plant manager, Mr Corbet and the supervisor, Mr du Preez.

[3] The employee was charged with the following misconduct:

> *"1. Whereby you on 2004/05/10 between approximately 23:15 and 00:46 in the 4PU01 area and at the 4TK01 tank in the BMR plant participated and/or assisted in the illegal removal of Platinum Group Metal concentrate without any authority and/or permission.*
>
> *and/or*
>
> *2. Whereby you on 2004/05/10 between 23:15 and 00:46 and/or 2004/05/16 at approximately 9:22 in the 4PU01 area and 4TK01 tank in the BMR plant were in possession of Platinum Group Metal concentrate without the necessary authority from the company and/or your supervisor."*

[4] The applicant in support of its case relied on the testimony of both Mr Corbet and Mr du Preez. The video cameras from which the video footage were taken from was installed by Mr du Preez.

[5] Mr du Preez testified that he inspected the video footage but could not identify the people who appeared on it. It was Mr Corbet and Mr du Preez the plant supervisor who identified the employee as he appeared on the video footage.

[6] Mr Corbet testified that he knew the employee having worked with him for a period of six years. He further testified that management of the applicant became

aware of the loss of the platinum group concentrate when the security found some parcels containing PGM hidden in the plant.

[7] Mr Corbet further testified that he was informed by the security about the recording they had made and invited him to come and observe the video. In watching the video footage he observed employees illegally removing the PGM and not attending to the repair of a flange.

[8] Mr du Preez, testified that the parcel which was found hidden in the plant was taken to the laboratory for testing and it was found that it contained PGM materials. He further testified that he was able to identify the employee with the two other employees on the video footage and that from his observation they were not repairing the leaking flange but were busy tapping the PGM material. According to him it takes 3 (three) to 4 (four) minutes to repair the flange but the footage showed that the employees on that day took more than 10 (ten) minutes attending at the flange which is not normal.

[9] The person repairing the flange does not according to Mr du Preez, put the bucket under it. He stated that the video showed a steam coming out which is an indication that the solution was hot. He also stated that after cleaning the area the employee can be seen with a white jacket which he normally wears.

[10] During cross examination Mr du Preez testified that he did not watch the whole of the video and that he was shown only certain people on the video. He also testified during cross examination that there were 8 (eight) people working in different departments on that day and that he was able to identify them because he was their supervisor.

[11] The two witnesses testified further during cross examination that there were 8 (eight) employees on duty on the night in question. The employee on the other hand said that there were 10 (ten) to 12 (twelve) employees were on duty during that night. It is thus common cause that there were more than the three employees on duty that night.

[12] The employee's case is that as a plant operator his duties entail having to ensure the smooth operation of the plant. He denied having been involved in theft of the PGM and that he was unable to identify the people on the video footage. He further stated that he worked in the area in question and that buckets are used in the sulphur dioxide gas by putting water in the bucket.

The grounds for review

[13] The ground for review is set out by the applicant in its founding affidavit as follows:

> *"It is Applicant's case that the award contained in Annexure "A" hereto is reviewable and falls to be set aside since:*
>
> *8.1 First Respondent found that the employee was one of the employees involved in the removal of the platinum concentrate on 10 May 2004 and had assumed he was one of those depicted on the video recording. He did not deal with the evidence of MR DU PREEZ that the employee was identifiable by the white jacket he normally wears and his manner of walking and his posture. He also did not deal with the evidence of MR CORBETT that he had worked with the employee for a long period of time and recognised him on the*

video. In failing to deal with this evidence and in effectively ignoring it First Respondent either committed a gross irregularity or reached a conclusion that is not justifiable with reference to the evidence adduced before him. The award thus falls to be set aside on review."

[14] Subsequent to filing its founding affidavit wherein the above ground for review is set out, the applicant filed its notice in terms of rule 7(A) 8 of the rules of the Court indicating that in terms of that notice it stands by both its notice of motion and the founding affidavit.

[15] After receipt of the above notice the third respondent filed their answering affidavit. Upon service of the answering affidavit by the third respondent, the applicant had five days within which to file its replying affidavit. The applicant filed its replying affidavit more than 9(nine) months later with no application for condonation.

[16] In the absence of an application for the condonation for the late filing of its replying affidavit, this Court has no option but to strike the applicant's replying affidavit off the pleadings. In any case, in my view, the replying affidavit does not assist the case of the applicant as will appear more in details when the merits of the matter is considered.

The arbitration award

[17] The commissioner in his analysis of the evidence which was presented before him says:

“In this case only substance was in dispute. Procedure was not in dispute. The respondent called three witnesses supplemented by the video that was shown during the hearing. The charges against the applicant emanate from the video footage of which the second and third witnesses for respondent alleges that one of the persons shown on that video is the applicant. The first witness for the respondent is a (sic) security officer who did not know the people on the video footage at all. The second and third witnesses for the respondent rely (sic) on the fact that they have worked with the applicant for a long time and hence they are able to identify him. Besides that there is no feature1hey have put forward in identifying the applicant. They (sic) conceded that not every person will be able to identify the applicant on that video. The video footage itself is of poor quality. The respondent's third witness under cross examination stated that there were 8 employees for that shift whilst applicant stated that sometimes they were 10, 11 or 12. In other words it not in dispute that there were more than 3 employees on that shift.

After analysing and considering the evidence and arguments presented I have come to the conclusion that the respondent’s case is based on assumptions. They assumed that because the operators who were on that shift at that night and who were supposed to work in that area were the applicant, Malatji and Matlou were therefore the people on that video. Anybody out of the 8 employees on that shift could have done what the people on that video were doing. No evidence was presented that if you

are in another department it is impossible for you to go to the 4TK01 area. The video was also edited."

[18] As stated earlier the commissioner found the dismissal to have been substantively unfair and ordered both compensation and reinstatement of the employee.

Evaluation of the award

[19] The test to apply in evaluating whether there is a basis to interfere with a commissioner's award is that of a reasonable decision-maker as set out in a number of Court decisions in particular in *Sidumo v Rustenburg Platinum Mines Limited (2007) 28 1LJ 2405 (CC).* See also other decisions that followed that decision like *Fidelity Cash Management Services v Commission for Conciliation, Mediation & Arbitration & others [2008] 3 BLLR 197(LAC), Edcon Ltd v B Pillemer NO and Others [2008] JOL 21412 (LAC); Phalaborwa Mining, Co Ltd v Cheetham & others[2008] JOL 21301 (LAC)* and *Mkhwanazi v Moodley NO & others [2008] JOL 21392 (LC).*

[20] In *Fedelity Management* the Court emphasised that the reasonable decision maker's test is:

"… is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objective of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of

the case. It will not be often that the decision of the arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all circumstances, have reached."

[21] The essence of the ground of review quoted above, as I understand it, is that the commissioner failed to properly consider, evaluate and deal with the evidence of the two witnesses of the applicant concerning the identification of the employee on the video footage.

[22] In my view the ground of review quoted above does not make out a case warranting interference with the decision of the commissioner. I will revert back to the other grounds of review raised by the applicant subsequent to filing its founding affidavit later in this judgment.

[23] It is apparent from the reading of the above extract that contrary to the complaint of the applicant the commissioner did considered the evidence of Mr du Preez and Mr Corbet concerning the identification of the employee as supposedly appears from the video footage. After considering the evidence of the two witnesses and finding that they were unsatisfactory, he proceeded to consider the video footage. It is apparent from reading the record that the testimony of the two witnesses was largely based on what they saw on the video footage. The commissioner found that the video was of very poor quality, was edited and the faces of the people on it can not be seen. It was for this reason that the commissioner found that the applicant's case was based on assumptions.

[24] In considering the evidence of the two witnesses of the applicant the commissioner found that except for saying that they knew the employee, they

could not provide any other feature present in their identification of the employee and his fellow employees. In this respect the commissioner found that the applicant's witnesses assumed that the people on the video were the employee and the two others because they were supposed to have worked in that area on that day. It is for this reason that the commissioner concludes that any one of the 8 (eight) people who were on duty on that shift could have done what the people on the video are being seen doing.

[25] I do not see how this Court could in the absence of the video footage be able to assess the reasonableness of the conclusion reached by the commissioner that the video footage was of poor quality. It is now well settled that the duty to place a full record of the proceedings before the Court rests with the applicant. In this instance the applicant has failed to discharge that duty by failing to place before this Court the video footage which was central to the case of the applicant during the arbitration proceedings.

[26] In my opinion, based on the above, the applicant has failed to make out a case showing that the conclusion of the commissioner is unreasonable or reviewable based on any other grounds of review. For this reason alone the applicant's review application stand to be dismissed.

Further grounds of review

[27] The applicant has in its heads of argument raised further grounds of review which are not raised in the found affidavit. The only ground of review raised in the applicant's founding affidavit is the one quoted earlier in this judgment. I do not deem it necessary to repeat the grounds for review raised by the applicant in

its heads of argument. In my view the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies on in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit. In *Country Fair v CCMA & Others [1998] 6 BLLR 577 (LC),* at page 580 paragraph 8 the Court in dealing with this issue held that a party that relied on the provisions of section 145 of the Labour Relations Act 66 of 1995, in its notice of motion and founding affidavit could not invoke the provisions of section 158 (1) (g) of the same Act as a ground for review during argument.

[28] The principle that a litigant cannot seek to introduce a new ground for review having failed to do so in the founding or supplementary papers is set out succinctly in *Director of Hospital Services v MISTRY 1979 (1) SA 626) at 635A — 636F (AD),* where the Court in dealing with this issue had this to say:

> *"When as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in Pountos' Trustees v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:*
>
> *". . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the*

application is the allegation of facts stated therein, because those are the facts which the respondent is called upon to confirm or deny."

[29] The principle is aptly summarised in the head note in *Smuts v Adair [2004] 1 BLLR 34 (LAC)*, where it is stated that an applicant was not entitled to rely on arguments that were raised in the founding affidavit. See also *Mauerberger v Mauerberger 1948 (3) SA 731 (C) at 732 and Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 368B — 369A.* It is thus clear from this authorities that an applicant stand or fall by the grounds of review set out its notice of motion and affidavit and as may have been varied amended or supplemented in terms of rule 7A (8) (a) of the Labour Court Rules. It follows therefore that the applicant in the present matter could not extend or add on the new grounds of review or make a fresh complaint against the commissioner's award in the heads of argument in particular after filing the notice in terms of rule 7A(8)(b), confirming that it stands by the notice of motion. It stands to reason that no regard shall be had to the complaint raised by the applicant for the first time in its heads of argument. It also means that this Court had to consider only one ground of review. The basis of that ground of review and its sustainability was considered earlier in this judgment and as stated it does not warrant interference with the arbitration award.

[30] In my view law and fairness dictates that the costs should in the circumstances of this case follow the results.

[31] In the premises the application to review and set aside the arbitration award of the first respondent under case number LP3534/04 dated 14th August 2007 is dismissed with costs.

Molahlehi J

Date of Hearing : 23rd April 2009

Date of Judgment : 26th August 2009

Appearances

For the Applicant : Adv R G Beaton

Instructed by : Van Zyl Le Roux & Hurter Inc

For the Respondent: Andrew Goldberg of Nomali Tshabalala Attorneys