IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1044/08

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED
(AMANDELBULT SECTION)

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION — First Respondent

MATSEPE, H, N.O. — Second Respondent
NATIONAL UNION OF MINEWORKERS — Third Respondent

MAPHUNYE, P.P. — Fourth Respondent

–

JUDGMENT

–

FRANCIS J

Introduction

1. This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (the Act) to review and set aside an arbitration award issued by the second respondent (the commissioner), in which he found that the dismissal of the fourth respondent by the applicant was substantively unfair and awarded him seven months salary as compensation. The applicant seeks an order that the matter be referred back to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for arbitration *de novo* before another commissioner other than the second

respondent.

2. The review application was opposed by the third respondent, the National Union of Mineworkers (NUM) on behalf of the fourth respondent.

The background facts

3. The fourth respondent was employed by the applicant as a miner, which is a senior supervisory position. The carrying of cell phones underground is strictly prohibited, because the signals from a cell phone can ignite an underground blast. Employees have been dismissed in the past for such misconduct.

4. On 10 May 2006, the fourth respondent was charged with breaching the company rules in that he had allegedly carried a cell phone underground during the night shift on 9/10 May 2006. He appeared at a disciplinary hearing, was found guilty and dismissed on 16 May 2006.

5. He referred an unfair dismissal dispute to the CCMA for conciliation and arbitration. There were various sittings during 2007 and early 2008. At the arbitration hearing only the substantive fairness of the fourth respondent's dismissal was in dispute. The applicant commenced adducing evidence and called four witnesses, namely Sello Marcus Pesha (Pesha), Edwin Moremi Mafuleke (Mafuleke), Sebele Pilane (Pilane) and Herman Heirich Bense (Bense). An inspection *in loco* was undertaken during Pesha's evidence. The fourth respondent testified in his defence and the parties submitted written closing arguments.

6. In an award dated 10 April 2008, the commissioner found that the applicant had failed to prove that the fourth respondent was guilty as charged, and, accordingly, awarded him seven months' salary as compensation.

The arbitration proceedings

7. It is not necessary to set out the evidence led in any great detail since this has been set out in the arbitration award. It is clear from the evidence led that on 9 May 2006, two patrol men, Pesha and Mafuleka conducted an explosive search at 16 chair stairs between 5h00 and 5h30 in the vicinity of the entrance and to see whether employees were obeying the rules regarding cellphones and cigarettes etc. Cellphones are not allowed to be taken underground for safety reasons. There is a contraband box in which employees going underground should leave their cellphones or matches therein. The chair lift operator is in possession of the box keys. When the fourth respondent came from underground, Pesha asked him for permission to search him. He found a Nokia cellphone in his possession and showed it to Mafuleka. Mafuleka's role was to observe employees for explosives' searches before they could reach the contraband box to ensure that they had nothing on them that were disallowed. Pesha searched employees coming from underground. The fourth respondent made a statement in which he stated that the policeman found him in possession of a cellphone from nowhere. When he went underground, he left the cellphone at the chair lift box and found it when he knocked off. Mafuleka would have seen the fourth respondent if he went to the contraband to collect his cellphone. Pilane who is employed as an employee relations coordinator testified that he attended the disciplinary hearing to ensure that the procedures were followed. The applicant was consistent in the meeting out of discipline for similar offences. The fourth respondent was charged

with misconduct, was found guilty and was dismissed. Bense testified about the matter relating to a Mr Ngwato who was charged with the same misconduct, was found guilty and was dismissed. He chaired his disciplinary hearing and substituted the dismissal with a final warning due to the particular circumstances of the case.

8. The fourth respondent testified in his own defence. He testified that before he went underground he gave his cellphone to a fellow worker who was in charge of the chairlifts. He knew that cellphones were not allowed underground. When he returned from underground on 10 May 2006 one of the fellow worker, Mfikoe gave him his cellphone. He believed that Pesha saw this. When he approached Pesha, Pesha told him that he wanted to search him. Pesha searched him and found the cellphone on him. Mafuleka was doing observation duties. On 10 May 2006 he was called by the human resources department and was told about the incident. He explained that the cellphone was not in his possession when he went underground but took it from Mfikoe when he returned from underground. Mfikoe made a statement on 12 May 2006. He attended a disciplinary hearing with Mfikoe on 15 May 2006. He was found guilty and was dismissed. He did not want to be reinstated but sought compensation.

The arbitration award

9. The commissioner summarised the evidence led in his award. He said that the procedural fairness was not an issue and that the applicant had to prove the substantive fairness of the fourth respondent's dismissal. The only issue that had to be determined was whether the fourth respondent had breached the rule. The existence of the rule was not in dispute. If the rule was found not to have been

breached, the fourth respondent's dismissal would be substantively unfair. If it was breached, the next issue would be around the consistency and whether the sanction imposed was appropriate.

10. The commissioner said that he had to specifically scrutinise the versions of the applicant's witnesses and that of the fourth respondent. He then dealt with the evidence led by the parties. It is not necessary to repeat this save to say that Pesha searched the fourth respondent and found the cellphone on him whilst Mafuleka kept the employees under observation. The fourth respondent denied that he had the cellphone on him whilst he was underground and he had collected it from Mfikoe the chair lift operator. The commissioner said that he had to look at the crucial parts of their testimonies and analyse same to see whether it was reasonably probably true. The commissioner proceeded and dealt with the discrepancies around the time when the fourth respondent was searched, the surveillance camera and at what stage the fourth respondent was searched. He said that the full video should have been used to clarify the doubts that existed.

11. The commissioner said that having considered the totality of the evidence he could only arrive at the following logical conclusion that the fourth respondent was indeed searched and found in possession of the cellphone; that it could not be said that the fourth respondent was the person identified on the video footage by witnesses and that the witnesses possibly searched someone else and got their facts possibly wrong to say that the said person was the fourth respondent. The commissioner said that the other problem that he had was even the chairlift operators were not appearing on the edited footage. As they are working around the cameras, it is possible they could have been

captured. If Mfikoe, the chair lift operator, was indeed on duty and acted as alleged by the fourth respondent, the camera could have captured him. If the applicant could have shown him the whole footage of 5h00 to 5h30 without editions, it would have helped him to get a better picture. By showing only the selected parts did not help to erase possible reasonable doubts.

12. The commissioner said that the fourth respondent's version was reasonably probably true. He could have been given the cellphone by Mfikoe. Pesha could not have seen this taking place because of the manner in which he was positioned. Mafuleka on the other hand who was well placed testified that he concentrated only on the employees emerging from underground by means of chairlifts. There was no evidence that he also concentrated on events from behind his back at the time. The applicant did not succeed to prove that the fourth respondent indeed committed misconduct for which he was charged. He could not agree that there was conclusive or reasonable evidence that the fourth respondent indeed committed the misconduct with which he was charged. Pesha and Mafuleka did not corroborate each other at all concerning the actual observation and the actual search of the fourth respondent. Each of them was not noticed by the other when carrying out the task they each carried. They further gave to some extent contradictory and unconvincing evidence on the issues of time on which the fourth respondent was noted and the times on when he was searched as well as the actual happening of the search itself. They are single witnesses to events applicable to the spot where they were posted. Although the evidence of a single, uncorroborated witness is also acceptable, he could not do so when taking all factors of the case into account. The two witnesses altered some parts of their versions once under cross examination and this placed doubt on the accuracy of their testimony.

Although both went out on a joint mission of carrying out searches at 16 chairlifts, they however could not see what the other was doing once the search mission got underway. The said mission had serious consequences for an employee who could have been found with a cellphone in contravention of the company rule. Such employee could be dismissed, with disastrous consequences. He would have expected the security officers of the applicant to have positioned themselves in such a manner that they could at least corroborate each other and give clear consistent evidence both in evidence in chief and cross examination. Their answers under cross examination casted some doubt on the accuracy of their version. The commissioner said that he could not therefore reasonably and fairly arrive at the conclusion that the applicant succeeded to prove that the fourth respondent indeed committed the misconduct with which he was charged.

13. The commissioner concluded that the fourth respondent's dismissal was procedurally fair but substantively unfair and awarded him seven months compensation.

The review application

14. The applicant has raised several grounds of review. It is not necessary for purposes of this judgment to deal with all the grounds of review. The applicant contended that in finding that the dismissal was substantively unfair and making the award in question, the commissioner committed several reviewable irregularities by exceeding his powers and/or making findings that were not rational or reasonable in relation to the reasons given or the material properly before him, and/or committed gross irregularities regarding the arbitration proceedings. The commissioner used the wrong standard of proof in assessing the evidence and in doing so committed a gross

irregularity and thereby produced an award that cannot be said to be reasonable in the circumstances. The commissioner's finding that the dismissal was substantively unfair is not one that a reasonable decision maker could make.

Analysis of the evidence and arguments raised

15. It is common cause that the applicant has a policy in the workplace which prevents employees from taking cellphones under ground for safety reasons. The fourth respondent was aware of the rule and did not dispute the reasonableness and fairness thereof. His defence was that he did not breach the rule in that he gave the cellphone to the chairlift operator before he went under ground and received it when he came back to the surface. He was found with a cellphone in his possession but said that he did not take it underground. No video footage recorded that the cellphone was given back to him by Mfikoe. The applicant called four witnesses in support of its case. The applicant's main witnesses were the security guards who conducted explosive searches on 9 May 2006. The fourth witness testified about the issue of consistency and the matter relating to Ngwato who was also found in possession of a cellphone. He was dismissed but on appeal his dismissal was overturned and substituted with a final warning. The issue of consistency is not an issue in this matter since the fourth respondent has not filed a counter review.

16. The commissioner found that the applicant had failed to prove that the fourth respondent was guilty of the misconduct and that his dismissal was therefore substantively unfair. He found that the fourth respondent's version was reasonably possibly true.

17. As stated above the applicant has raised several grounds of review in this matter. Since the applicant is seeking an order to review and set aside the award and for the dispute to be referred to the CCMA to be heard by another commissioner other than the second respondent, it does not become necessary to consider the merits of the dismissal. It is also not necessary to analyse the evidence given by the parties since this is a matter that another commissioner would have to do. The position might have been different had the applicant sought an order that this Court deal with the matter. It would also be unfair to both parties and in particular to the fourth respondent if this Court was to make any pronouncements on the evidence led.

18. One ground of review raised by the applicant is that the commissioner misdirected himself on the evidentiary test. The commissioner when analysing the different versions placed before he said the following:

"I had to look at the crucial parts of their testimonies and analyse same to see whether it was reasonably probably true.

If the respondent [applicant] *could have shown me the whole footage of 5h0 --5h30 without editions it would have helped me to get a better picture. By showing only the selected parts did no help to erase possible reasonable doubts.*

The version of the applicant [fourth respondent]*is reasonably probably true. He could have been given the phone by the said Mfikoe.*

For the reasons given above, in analysis of evidence, I cannot agree that there is conclusive or reasonable evidence that applicant [fourth respondent] *indeed committed the misconduct which he was charged."*

19. It is trite that the test to be employed to decide whether an employee is guilty of the

misconduct alleged by the employer at the arbitration hearing is on a balance of probabilities. The commissioner did not apply the civil law standard of proof which is on a balance of probabilities but the criminal law standard of proof which is beyond a reasonable doubt.

20. This Court has previously held that when a commissioner errs by applying a standard stricter than proof on a balance of probabilities, the award is reviewable. See *Potgietersrus Platinum Ltd v Commission for Conciliation Mediation & Arbitration & others* (1999) 20 ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty) Ltd v Matji NO & others* [2003] 11 BLLR 1145 (LC) and *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* [2006] 9 BLLR 833 (LC).

21. The commissioner has failed to decide, on the evidence before him, the preponderance of probabilities given the conflicting versions presented by the parties during the arbitration proceedings. Since the applicant is seeking an order that the matter be heard *de novo* by another commissioner other than the second respondent, it becomes unnecessary for me to substitute my findings on the merits.

22. In these circumstances, it is not necessary for me to consider the further grounds for review on which the applicant relies in relation to the commissioner's finding of substantive unfairness. It cannot be said that the commissioner's finding is that which a reasonable decision maker would have made.

23. The application stands to be granted.

24. I do not believe that this is a matter where costs should follow the result.

25. In the circumstances I make the following order:

25.1 The arbitration award issued by the second respondent under case number LP2005-06 dated 10 April 2008 is reviewed and set aside.

25.2 The matter is referred to the first respondent for arbitration *de novo* before a commissioner other than the second respondent.

25.3 There is no order as to costs.

_____

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	A T MYBURGH INSTRUCTED BY LEPPAN BEECH INCORPORATED
FOR 3RD & 4TH RESPONDENTS	:	ATTORNEY E S MAKINTA
DATE OF HEARING	:	19 JUNE 2009
DATE OF JUDGMENT	:	28 JULY 2009