In the Labour Court of South Africa
Held in Johannesburg

Case number: JR 654/ 03

In the matter between:

Num	First Applicant
Mpamo Mokoena	Second Applicant

and

Tokiso Dispute Settlement (Pty) Ltd	First Respondent
M.H Marcus N.O.	Second Respondent
Anglo Operations Ltd	Third Respondent

Judgment

Cele AJ

Introduction

[1] This is an application to review and set aside an arbitration award which the second respondent issued on 25 February 2003 while he

was acting under the auspices of the first respondent. The dismissal of the second applicant was found to have been substantively fair. The application is opposed by the third respondent.

Background Facts:

[2] Mr Mokoena, the second applicant, was employed as an underground conveyor belt attendant by the third respondent, Anglo operations. Three shifts were run by Anglo operations for its staff and times for these were:

Morning shift – 07 h00 – 15 h00 / 16 h00
Afternoon shift – 15 h00 – 23 h00 / 00h00 and
Night shift – 23 h00 – 07 h00 / 08h00

[3] In terms of the shift rooster, if an employee worked a night shift on 2 June 2002 to 3 June 2002, the arbitration commissioner was made to regard it as a shift worked for 3 June 2002. Accordingly, a night shift for commencing on 3 June 2002 to 4 June 2002 he was made to regard it as a shift for 4 June 2002.

[4] On 3 June Mr Mokeona was schedule to work a night shift commencing at 23h00 – 7 h00. He duly reported for duty and clocked in at around 22h33. At 06H 35 on the following morning he clocked out. He was due to commence his next shift at 23h00 on 4 June 2002 which shift would end at 6h35 on 5 June 2002. However, Mr Mokoena went to consult a medical practitioner who in turn, due to the nature of illness, gave Mr Mokoena a sick leave from 5 June 2002 until 8 June 2002 and issued him a medical certificate.

[5] On that afternoon of 5 June 2002 Mr Mokoena went back to the offices at his work place but did not find his supervisor a Mr J.P. De Waal but instead found one Mr Piet De Wet. Mr Mokoena handed the medical Certificate to Mr De Wet who then acknowledge receipt thereof by attesting his signature to the certificate. Mr Mokoena left the mine without working his shift.

The internal misconduct hearing:

[6] On 20 September 2002, Mr Mokoena was issued with a notice to attend a disciplinary hearing on 23 September 2002. He was charged for being absent from work without permission on 4 June 2002. Mr Le Roux was the chairman, Mr De Waal was the complainant and Mr Mtsweni was a union official who represented Mr Mokoena. Proceedings were delayed and only commenced on 3 October 2002 which was about four months after the alleged incident. Mr Mokoena pleaded not guilty to the charge.

[7] The only evidence tendered by Anglo Operations was of a statement which Mr De Waal had made and he also relied on a print out from an attendance monitoring system called Saco which was used at the place of employment when employees clocked in and checked out.

[8] Mr Mokoena was asked by the chairman to explain why he pleaded not guilty. He said that he was not absent without permission from work. He said that the way he was treated at work was not right as he would be wrongly accused and convicted. He was asked by the chairman if he was at work on the day in question and responded

by saying he did not know how to answer that question as Mr De Waal had said that he had evidence against him. When the question was repeated, Mr Mokoena said that he did not recall clearly if he was at work or not and repeated the complaint of wrong accusations being laid against him. His representative asked if it did not happen that an employee would come to work and the Saco system would reflect him to be absent without leave to which Mr De Waal answered in the negative. The chairman said that it could happen if the employee did not clock properly or if he bypassed the system. Mr Mokoena said that Mr De Waal was not at work on the day in question and he said that Mr De Waal charged him out of anger and hatred. He was again asked if he was at work or absent without permission. He again said that he was not absent without permission and he said that he had permission given to him by Mr De Waal. Mr De Waal denied this. When he was asked what the permission was for, he said that it was for him not to be at work.

[9] The chairman then asked about three times if Mr Mokoena was at work. He retorted by saying there was a print out to look at and that it was said that the Saco system could not be tempered with. He denied that he had any data on why he was not at work. He told Mr De Waal that if he had been asked why he had not been at work, he could have explained it. He was asked to state his case and he said that he had explained that his supervisor had the data. He was repeatedly asked to tell what data he was referring to and he said that Mr De Waal was to do his job properly. He said that Mr De Waal had a reason why he lodged the complain even though he (Mr De Waal) had evidence why he was not at work. Mr Mokoena complaint about being wrongly accused of not being polite with his

supervisor, at that enquiry. He repeated that Mr De Waal knew the reason why he had not been at work. At the end of the enquiry, he was found to have committed the misconduct with which he was charged. On 18 October 2002 he was dismissed.

[10] On 2 December 2002, Dispute Resolution Committee (DRC) meeting was held in accordance with the provisions of the disciplinary code. Mr Mokoena said that he had submitted a medical certificate to Mr De Wet on 5 June 2002. The committee was further advised that in terms of an "employment history", Mr Mokoena had reported on duty on 4 June 2002. A "payroll report" was also presented as further proof that Anglo Operations had been advised of the sick leave which was advised of the sick leave which was recorded on the reporting system.

[11] The DRC committee rejected Mr Mokoena's explanation on the basis that the issue of a medical certificate was never explained to the chairman of the disciplinary hearing and it held further that it was improper of Mr Mokoena to come up with the issue after five month of dismissal. Parties ended in a deadlock and the dispute was referred for private arbitration in terms of Anglo Operations disciplinary code and procedures.

Arbitration proceedings:

[12] On 14 February 2003 arbitration proceedings commenced, with the second respondent as the arbitrator. The applicant was represented by an official of NUM, a Mr Shakhane. While the third respondent was represented by a Mr Mqobokazi. The only issue for a decision

was whether the dismissal was substantively fair or not. If guilty, the question of the appropriateness of sanction would not arise. Procedural fairness was also not questioned.

[13] The arbitration proceedings were not mechanically recorded but the only recording was one of a long hand which was done by the second respondent. When a record of the proceedings was later asked for, the second respondent read his notes into a mechanical recording which was then transcribed. He did not state the evidence tendered before him but merely gave an analysis of such evidence, both in the award and in the reading of his notes.

[14] As far as can be determined the evidence brought to the second respondent, was constituted of a bundle of notes taken during the internal disciplinary hearing and *viva voce* evidence of Mr De Wet, Mr Jacobs and Mr Jacques Le Roux called by the Anglo Operations. Mr Mokoena testified but did not call any witnesses.

[15] A bundle of documents containing minutes of the internal disciplinary and the appeal hearings was handed in and received as a correct record of such hearings. Mr Le Roux also confirmed the correctness of the minutes.

[16] It was common cause that Mr Mokoena was absent for the night shift of 4 – 5 June 2002. The justification offered for his absence at the arbitration proceedings was a medical reason supported by a medical certificate which Dr Mashifane had issued on 5 June 2002. The evidence tendered on behalf of Anglo Operations was (to the effect) that the medical certificate was not tendered at the time of

absence of Mr Mokoena on 4 – 5 June 2002 or at his disciplinary or appeal hearing. It was said that such evidence was only tendered by the union in justification of Mr Mokoena's absence, at the DRC meeting of 2 December 2002. The minutes were relied on to support that version.

[17] Mr Mokoena said that he submitted the medical certificate to a supervisor, Mr De Wet on 5 June 2002 in justification for his absence for the period 5 – 8 June 2002.

[18] The evidence tendered for Anglo Operations was that Mr Mokoena was charged for his absence on 4 June 2002 and that was to be understood to have been for a shift starting at 3h00 on 4 5 June 2002 and to end at 06H30 on 5 June 2002. Mr Mokoena's evidence was that he understood the period for which he was charged to have been from 23h00 3 June 2002 to 7H00 on 4 June 2002 and that any explanation of his absence was in relation to that period. It however remained common cause in the arbitration proceedings that Mr Mokoena was on duty on the shift of 3 – 4 June 2002.

[19] It was suggested to Mr Le Roux that Mr Mokoena had told Mr Le Roux, in the disciplinary hearing, that Mr Mokoena was at work for the period alleged and that is 3 – 4 June 2002.Mr Le Roux disputed that assertion and reference was again made to the minutes.

[20] Mr Shakhane suggested that the minutes of the disciplinary hearing were not correct in relation to an explanation which he said had been given by Mr Mokoena on his absence. The second respondent

held him to the concession which Mr Shakhane had made at the beginning of the arbitration proceedings. That concluded evidence led at the arbitration proceedings.

The award:

[21] The second respondent found that the 4th of June 2002, by common practice referred to the night shift of 3 – 4 June 2002 and not 5 June, the night shift for which it was common cause that the applicant was absent. He however found that the subject of the present charge was applicant's absence on the night shift of 4 – 5 June 2002. He found that the submission of the medical certificate was not to excuse the applicant for his absence on the night shift of 4 – 5 June 2002. He opined that the applicant would have raised the submission of the medical certificate as a justification in defense of the charge at his disciplinary and appeal hearing if its submission was to excuse him for such absence.

[22] The second respondent found that no mention of medical reasons for his absence or of the medical certificate was made by the applicant or his representative at either of the hearings and he found that that corroborated the third respondent's version that no medical grounds or certificate were offered to excuse the period of absence charged until the DRC meeting of 2 December 2002, He found that the failure of the applicant to raise any form of medical justification for his absence prior to 2 December 2002 meant that this ground could not be accepted in the arbitration proceedings as a credible ground of justification for his absence and he rejected the same as an after thought.

[23] The second respondent rejected the applicant's version which was that his defense as raised at the previous hearings did not speak to his absence on the night shift of 4 -5 June 2002 but was directed to the previous night shift of 3 – 4 June 2002. He held that, if indeed the applicant's version were true, applicant would simply have said that the charge was unfounded in that he was present at work and not absent as charged.

Review ground

[24] The only ground for review which the applicant placed reliance on is that the second respondent failed to apply his mind properly to the facts that were before him. As a result of such failure, it was submitted that he committed a reviewable irregularity.

Analysis

[25] No statutory reference has been made by the applicant as the premise on which the review ground is founded. A "reviewable irregularity" would fall under a "gross irregularity" as envisaged by section 145 (2) (a) (ii) of the Labour Relations Act 66 of 1996, the Act. Under common law grounds of review this application may also be premised due to the allegation by the applicant that the second respondent failed to apply his mind properly to the facts that were before him. See in this regard**: Nina v Booysen 1992 (4) SA 69 (A) and Khula Enterprise finance Ltd v Madinane & others (2004) 25 ILJ 535 (LC).**

[26] Section 145 of the Act reads:

> "(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
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> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in part 1 to 4, or section 17, 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
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> (b) if the alleged defect involves an offence referred to in paragraph (a) within six weeks of the date that the applicant discovers such offence.
>
> (2) A defect referred to in section (1), means –
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> (a) that the commissioner –
>
> (i) committed misconduct in relation to the ,duties of the commissioner as an arbitrator;
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> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
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> (iii) exceeded the commissioner's powers; or
>
> (b) that an award has been improperly obtained".

[27] The substance of the review application indicates that the application is therefore founded either on section 145 of the Act or on common law.

[28] It was common cause between the parties that the applicant was dismissed by the third respondent. In terms of section 192 of the Act therefore, the third respondent bore the onus of proving that such dismissal was for a fair reason.

[29] Evidence tendered at the arbitration proceedings included a bundle of documents handed in by the third respondent. The second respondent may not reasonably be faulted in the manner in which he admitted and dealt with the bundle of documents. In search of the truth, the second respondent was entitled to investigate any inconsistency there might have been between evidence adduced at the arbitration proceedings and evidence adduced in the internal disciplinary and the appeal hearings. In doing so, he had to remind himself of where the onus of proof lay.

[30] The first aspect which called for a resolution by the second respondent, related to the period of the charge. It had to be proved by the third respondent whether 4 June 2002 referred to a shift of 3 – 4 June 2002 or 4 – 5 June 2002. The applicant did not bear this onus. It was encumbent on the second respondent, in the performance of his duties, to resolve any conflict or contradiction of the parties in relation to this aspect, in his award.

[31] If the evidence before the second respondent proved that 4 June 2002 referred to the shift of 3 – 4 June 2002, he had to acquit the

applicant as it was common cause that the applicant worked that shift. Proof therefore that the applicant was rather absent from duty on the shift of 4 – 5 June 2002, would not entitled the second respondent to return a guilty verdict as the applicant would not have been charged for that period. In the words of the applicant, which are conceded to by the third respondent, the second respondent would not be entitled to change the charge leveled against the applicant.

[32] I am therefore faced with the task of having to determine whether or not the second respondent changed the charge, as alleged by the applicant but disputed by the third respondent.

[33] There does not appear to be any evidence adduced at the arbitration hearing by the third respondent to prove that the alleged common practice of the third respondent was that 4 June 2002 referred to a shift period of 4 – 5 June 2002 and not 3 – 4 June 2002.

[34] In relation to the matter at hand, the second respondent made, *inter alia* , the following remarks in his award :-

> "…….. at his evidence at the arbitration, grievant sought to explain this omission by claiming that his defence as raised at these hearings did not speak to his absence on the night shift of 4 – 5 June 2002 (which period is conventionally and in company practise denoted as 5 June); it was rather directed to the previous night shift of 3 – 4 June when it is common cause he was present and reported for duty. He found this explanation on the submission that the date of absence reflected on the charge notice is 4 June, which date

> by common practice refers to the night shift of 3 – 4 June and not 5 June, the night shift for which it is common cause he was absent".

[35] It must necessarily followed from the above quote that, the second respondent understood 4 June 2002 to have been reference to the shift period of 3 – 4 June 2002 in terms of the convention or common practice of the company. The second respondent has filed an explanatory affidavit and a reply to the request in terms of rule 7A. He has attempted to resolve this aspect. He however, has not made any reference to there being any evidence of the third respondent which proves such convention or common practice. Both in his award and in his explanatory affidavit, the second respondent has failed, in his duties as a commissioner, to resolve a contradiction which relate to an essential allegation of the charge. Should it however be that the third respondent did prove the existence of the convention or common practice, reference to which has hitherto been made, the second respondent failed to apply his mind to such evidence. In either way, the second respondent has in so doing committed a gross irregularity.

[36] In my findings, the second respondent indeed did change the charge such that it could conform to the date on which the applicant was indeed absent. He has himself conceded in the explanatory affidavit that he had no power to amend the charge. He thus committed a gross irregularity justifying a review.

[37] I need to touch on another aspect of this case. It relates to the alleged delay by the applicant to have recourse to a medical

certificate as a defense tool. Such delay appears to have been measured in terms of the length of time from the period on which the applicant was charged till 2 December 2002, when the internal appeal was heard.

[38] As practice would have it in very many other cases, the charging, the holding of the internal disciplinary and appeal hearings could all have taken place in June, soon after the alleged misconduct. It does not appear to be, that the delay in this matter was attributable to the applicant. If the defense based on the medical report would have been sustained, had the internal disciplinary and appeal hearings been held in June or soon thereafter, it would be a miscarriage of justice to hold it against him when the delay was not due to him.

Order:

1. The award issued by Commissioner Marcus on 25 February 2003 in case number Tolko 3 / 10A is reviewed and set aside.
2. The matter is remitted to the first respondent for a *do novo* hearing before another commissioner.
3. The third respondent is ordered to pay costs of the application.

Date of hearing	: 15 September 2005
Applicant Counsel	: Adv Lengane
Instructing Attorneys	: Maserumule Incorporated
Respondent's Counsel	:
Instructing Attorneys	: Leppan Beech Attorneys
Date of Judgment	: 03 February 2006

Cele AJ

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