



REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JA 14/10

In the matter between:

NORTHAM PLATINUM LTD

Appellant

and

F M KGANYAGO N.O.

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

NATIONAL UNION OF MINEWORKERS

obo W MOAPE

Third Respondent

Heard: 23 March 2011

Delivered 22 February 2012

Summary: video footage- commissioner's finding that third respondent could not be identified on a balance of probabilities a reasonable decision- court *a quo* justified in not interfering with award- appeal dismissed with cost.

JUDGMENT

Landman AJA

Introduction

- [1] Northam Platinum (the appellant) appeals, with leave, against a judgment of the Labour Court (Moahlehi J) dismissing an application to review an award of Kganyao N.O. (the first respondent) a Commissioner of the Commission for Conciliation Mediation and Arbitration (the second respondent). The Commissioner found Moape, a member of the National Union of Mineworkers (the third respondent), to have been unfairly dismissed.

The facts

- [2] The appellant had good reason to believe that Platinum concentrate was being stolen from its plant. To prevent this, it caused video cameras to be installed and advised its employees of this. At the arbitration, it was the appellant's case that video footage of the K01 tank showed Moape, Malatji and Matlou (employees of the appellant) illegally tapping Platinum concentrate from a flange.
- [3] The video footage in question was of poor quality. This was admitted by the appellant's witnesses and it was said that "not anyone" would be able to identify the persons appearing in the footage. The Commissioner, who also viewed the video, recorded that he was unable to identify Moape on the footage. Moape also testified that he could not be seen on the video tape.
- [4] The Commissioner found that the appellant had not proven its case on the balance of probabilities and that the witnesses had assumed that Moape was one of the persons appearing on the footage because there were a limited number of employees on duty at the time.
- [5] The appellant sought to review the award in the Labour Court. The application was unsuccessful and the appellant was granted leave to appeal by the court *a quo*.
- [6] Mr Beaton SC, who appeared on behalf of the appellant, contended that the court *a quo* erred in finding that the conclusion reached by the Commissioner was one which the Commissioner could reasonably have reached on the evidence before him. Mr Beaton also contended that the court *a quo* erred in making an adverse inference against the appellant from the fact that it did not

make the video tapes available to the court so that the court of *a quo* could view them.

- [7] The foundation for the appellant's case was the video footage taken of the activities in the vicinity of the tank. The video footage was part of the record. It should have been placed before the court *a quo* because the Commissioner had clearly stated that he was unable to identify the employee concerned on the video tape which was screened during the arbitration and this played a significant role in him arriving at his decision. In fact, in the course of its judgment the court *a quo* remarked: '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'. This observation is unassailable.
- [8] Mr Beaton, however, argued that in view of the bad quality of the tape and observations of the Commissioner, it would have served no purpose for the court *a quo* to view the tape. It is also common cause that the face of Moape cannot be seen on the video tapes.
- [9] I accept that witnesses such as Du Preez and Corbett, who were in daily contact with employees, might better be able to identify them on video footage of poor quality. Du Preez and Corbett said they had worked with Moape for some time. They pointed to other aspects which could be material to the identification of this employee. Du Preez testified about the white jacket which Moape usually wore. It was not disputed that Moape usually wore a white jacket at work. Corbett mentioned the limited number of employees on duty at the time.
- [10] Mr Beaton submits that the Commissioner did not take this into account, as he did not summarise that part of Corbett's evidence dealing with the employees on duty at the time of the incident. The Commissioner, however, pertinently says: 'The second and third witnesses for the respondent rely on the fact that they have worked with the applicant for a long time and hence they are able to identify him.' The second and third witnesses refer to Corbett and Du Preez. Although the Commissioner refers to the evidence about Moape usually

wearing a white coat, he does not pertinently deal with this in his analysis. But one cannot expect an award to deal with each and every point presented in evidence. But the Commissioner does go on to say that there is no other feature that the appellant's witnesses have put forward in identifying Moape.

- [11] The Commissioner was clearly not satisfied that the two witnesses were able to identify the employee on the balance of probabilities. He concluded that when they said they identified the employee they did so because they made certain assumptions i.e. that the employees who were on duty at the time would work in that area and were the persons depicted on the video.
- [12] The Commissioner's finding that Moape could not be identified on a balance of probabilities by the two witnesses on account of the poor quality of the videotape, the denial by the employee that he was depicted on the footage and the fact that the Commissioner could himself not identify Moape, was a finding which the Commissioner could, in my view, reasonably have made. The Commissioner's explanation as to why the witnesses had identified the employee, even if incorrect, takes the matter no further. There is no basis for this Court to interfere with the decision of the court *a quo*.
- [13] With regard to costs I see no reason why costs in this matter should not follow the result.
- [14] In the result the appeal is dismissed with costs.

Landman AJA

I agree

Waglay DJP

I agree

Mailula AJA

APPEARANCES:

FOR THE APPELLANT:

R G Beaton SC

Instructed by Van Zyl Le Roux Inc

FOR THE THIRD RESPONDENT:

N Tshabalala

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