REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA123/2013

In the matter between:

THE NATIONAL UNION OF MINEWORKERS **First Appellant**

A M MAPHISA **Second Appellant**

And

THE COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION **First Respondent**

SINGH, M *N.O.* **Second Respondent**

IMPALA PLATINUM REFINERY **Third Respondent**

Heard: **25 November 2014**

Delivered: **29 April 2015**

Summary: Review of arbitration award – employee charged for being an accomplice to an attempted theft- commissioner finding employee's dismissal substantively unfair- employee failing to provide reasonable explanation for being connected to the theft – employee making contradictory statement about his whereabouts at the time of the commission of the infraction. Evidence pointing to the fact that employee seen in the building and his telephone pin code used to make calls around the time of the commission of the theft – evidence also showing that employee's uncle car used as a get-away car. Labour Court's judgment upheld - arbitration award set aside- dismissal of employee substantively fair.

Coram: **Waglay JP, Musi JA *et* Dlodlo AJA**

JUDGMENT

DLODLO AJA

Introduction

[1] This is an appeal against the judgment of the court *a quo* (Snider AJ) delivered on 10 April 2013 reviewing and setting aside the CCMA Commissioner's award and referring the matter back to the CCMA (to be presided over by a Commissioner other than the Second Respondent herein).

[2] On Thursday 18 February 2010, at approximately 12h20, an attempt was made to steal a quantity of pure precious metals (referred to as precious group metals or (PGM) from the refinery operated by the Third Respondent (Impala Refinery). An employee came to an upstairs room used as a supervisor's office which he found locked. Looking through the door window he saw two unknown men wearing orange hard hats standing inside the office. These unknown men opened the door and left, walking past the employee. On entering the office, he noticed that one of the windows to the office was broken and near it he found a blue bucket containing parcels of PGM material. A hammer was lying nearby.

[3] When the employee looked outside the window into the road, he saw another man dragging a white bag along the ground, looking around and talking on his cellphone. When the latter man was approached by a security officer on a motor cycle, he hurriedly jumped into a green Audi motor car which sped off. The security officer on the motor cycle gave chase. One of the occupants of the green Audi car threw out a parcel. The parcel was examined and found to contain PGM originating from theThird Respondent.

[4] Investigations revealed that Mr Maphisa (the Second Appellant herein) had been seen on the stairs leading to the supervisor's office from where the material was apparently thrown. Investigation further revealed that at the time that the attempted theft was being perpetrated, Mr Maphisa appeared to have been phoning an external person on their cellphone and that the green Audi

motor car used as the "get-away vehicle" belonged to Mr Maphisa's uncle, with whom he lived. Mr Maphisa was interviewed and he gave what the employer's investigator believed, were unsatisfactory answers.

[5] Mr Maphisa was charged with being an accomplice to the theft and the sanction imposed on him was dismissal. He challenged the procedural and substantive fairness of his dismissal in the CCMA. On 2 February 2011, the Commissioner issued an award in which she found that the dismissal of Mr Maphisa was substantively, (but not procedurally) unfair and she ordered the Third Respondent to reinstate him and pay him compensation equivalent to three months' salary as "back pay". It must, however, be mentioned that the court *a quo* granted leave to appeal on the basis that it had applied the principles relating to process or dialectic review which had been disapproved of by the Supreme Court of Appeal in *Herholdt v Nedbank Limited*.[1]

[6] The Commissioner made an observation that the charge which Mr Maphisa faced was "curious" and vague in that it did not clearly define the misconduct. In truth, the charge could have been worded more clearly but it does refer to the allegation that Mr Maphisa was guilty of. The allegation was clearly that Mr Maphisa had been an accomplice to or had an involvement in the theft or attempted theft which took place at Impala Refinery on 18 February 2010. It is common cause or it is at least undisputed that there was an attempt made on 18 February 2010 to steal valuable minerals and metals from the Third Respondent. It is not disputed that unauthorised persons were seen in an upstairs office where a window had been broken with a hammer to enable the precious metals to be thrown out onto the ground below and that the metals were collected by another accomplice and transported in a green Audi motor car. The important issue is whether Mr Maphisa was sufficiently connected with those events to the extent that an inference can be drawn that he made common purpose with those persons committing the theft.

[7] We bear in mind that circumstantial evidence depends for its persuasive power on its cumulative effect and that, at some stage, many *indiciae* may point to the same conclusion that one may properly say is the most probable

[1] *Herholdt v Nedbank Limited* (2013) 34 ILJ 2795 (SCA).

one to be drawn.[2] It is quite permissible to draw an inculpatory inference from the weakness of a Respondent's evidence.[3] The probabilities need balancing. It is also an important principle to remember that Courts in making inferences in civil cases often select a conclusion which seems to be the more natural or plausible one from amongst several conceivable ones. They do that even if that conclusion is not the only one.[4] It shall emerge *infra* that Mr Maphisa failed to provide a reliable or credible explanation in response to the evidence of De Necker as recorded *infra*. It is this failure on his part that contributes significantly to the ultimate inference that he was involved in the attempted theft.

[8] It is common cause that within the refinery is a secured building known as Service Block 1. On 18 February 2010, De Necker entered the building at approximately 12h20. He ascended one flight of stairs to the control room level and while walking past the male toilets, he looked up and observed Mr Maphisa ascending a second flight of stairs towards the supervisor's office. De Necker went to fetch paperwork from the Leach Control Room on the second level and then also ascended the same stairs on which he had earlier seen Mr Maphisa to go to the supervisor's offices on the top floor. It was there that he discovered the door was locked, he was passed by the two unknown men in the hard hats and saw the broken window and bucket containing precious metals. During cross-examination De Necker confirmed that he knew Mr Maphisa well by sight although the only time that he had spoken to him was when he had asked him his name. De Necker testified that because the technicians' rooms are usually locked, he assumed that Mr Maphisa was on his way to the supervisor's offices.

[9] It deserved to be mentioned that Mr Maphisa had been observed going to the offices where the misconduct or theft took place. His presence there was during the incident of theft. It was certainly not unreasonable for his employer to investigate his presence near the scene of the offence. Importantly, Mr Maphisa was interviewed by one Mr Mokhwane, the employer's investigations'

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[2] *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 136.
[3] *Nylon Printers supra* at 137.
[4] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159.

manager following the incident. Mr Maphisa denied that he could have been noticed going upstairs towards the supervisor's office by De Necker. During a second interview in the presence of Mr Nel and Mr Kemp, Mr Maphisa denied going upstairs. At the disciplinary enquiry, Mr Maphisa gave several different versions, namely: (a) He disputed that he walked up the stairs to the supervisor's office on the relevant date; (b) He testified that he went to the supervisor's room when called and that if he was seen in the building it might be that he was around the stairs, but not on them; (c) When asked where he was between 11h50 and 16h30, he replied that he went to lunch that day, but could not remember when he came back; (d) When asked where he was at the time of the attempted theft, he denied having gone up the stairs, was not aware of the incident and therefore could not reply.

[10] Evidence from access control system called Softcom revealed that Mr Maphisa used his card to access the building (Service Block 1) at 12h07. This was the entrance area where Mr Maphisa was seen by De Necker. There was no evidence that Mr Maphisa left the building until the access control records that at 12h39 he exited the search area to leave the building. Phone records reveal that during the approximate time when the offence was being committed, Mr Maphisa made two telephone calls to a cellphone outside the plant. The telephone calls emanated from telephones within the plant and were made by a person using Mr Maphisa's personal and confidential PIN number. Notably during the disciplinary enquiry Mr Maphisa was asked who he was calling. His reply was that this was private, unless the company had evidence that it was connected to the crime. He also stated that he does not recall who he phoned on that day because it was a long time ago. The question was asked whether the call at 12h22 related to the crime and he answered that he did not recognise the number on the printout so he could not say – he does not know.

[11] By the time Mr Maphisa had to testify at the arbitration, there was already strong *prima facie* evidence of his presence near the scene of the offence. There was no innocent or exculpatory explanation for being there. It was not Mr Maphisa's work area, it was not during lunch time and he initially denied

being there at all. He then said he did not know why he was there and could not explain why it appeared that he had made two telephone calls to an outside cellphone during the time of the commission of the offence and when he was in the building where the offence had been committed. The chairman of the enquiry correctly in my view found Mr Maphisa guilty of aiding the commission of the offence and dismissed him.

[12] It is important to mention that at the arbitration, Mr Maphisa (for the first time) offered an explanation. His explanation was that he was present in the building in order to change his overalls which had become dirty. He denied being seen on the stairs and contended that De Necker did not know him well enough to recognise him. He denied that they had ever spoken. He denied making telephone calls to the outside cellphone, contending that it was possible for someone else to have used his confidential PIN number. Mr Maphisa could not explain the following though: (a) Why his version that he had been at the premises to change his overalls was not mentioned at the disciplinary enquiry; (b) Why he had initially denied being in the building; (c) Why he never challenged De Necker's evidence that he saw him on the stairs during the disciplinary enquiry; (d) How, if he was responsible for the safety and security of his PIN number, persons were using it to phone outside cellphones during the period when the theft was taking place.

[13] Clearly Mr Maphisa's version at the arbitration conflicted with his version at the disciplinary enquiry. Mr Maphisa's failure to explain his presence in the building where the offence was committed gives rise to an inference that he had none. He was seen on the stairs – he gave no explanation for this. Indeed, the reasonable inference consistent with the proven facts is that Mr Maphisa was present there for purposes of assisting those who participated in the theft. The fact that the motor vehicle of his uncle with whom he resided was used as the "get-away" car needed to be explained. It created suspicion even though on its own it is not sufficient to implicate Mr Maphisa.

[14] It remains the duty of the presiding officer to make credibility findings because he/she is better positioned to do so. Thus, the Commissioner made observation that the witnesses for both parties were credible. However, Mr

Maphisa's evidence in the arbitration stood in marked contrast to his evidence at the disciplinary enquiry. No reasonable or rational explanation for this is found on the record. A Court's finding on credibility of a witness ordinarily depends upon a variety of factors such as the witness' candour and demeanour in the witness box, his bias, latent or blatant, internal contradictions in his evidence, external contradictions in what was pleaded or put on his behalf, or with established facts or with his own statements or actions outside the Court; the probability or improbability of particular aspects of his version; and the caliber and cogency of his performance, compared to that of other witnesses testifying about the same incident or event.[5] Courts on a number of occasions have warned about the risk inherent in relying on the demeanour of witnesses as a reliable guide to credibility.[6]

[15] It has been suggested (correctly I must point out) that an assessment of evidence based solely on demeanour without regard for wider probabilities constitutes a misdirection. A careful evaluation of the evidence against underlying probabilities must be carried out, otherwise little weight can be attached to the credibility findings of a judicial officer.[7] Apart from numerous contradictions, Mr Maphisa's explanations for aspects of his evidence are improbable. It is improbable that unknown persons would be using his PIN to phone outside cellphones without his knowledge at the time the offence is being committed and when De Necker is on his way to the supervisor's office. A cumulative look at the evidence and analysis thereof lead one to the conclusion (on the balance of probabilities) that Mr Maphisa was indeed involved in the theft. It is not necessary to establish the nature and extent of his involvement. The point is that making common purpose with persons engaged in a R2 million theft of your employer's produce is a very serious misconduct which ordinarily warrants the sanction of dismissal.

[16] The Supreme Court of Appeal in *Herholdt* deprecated the process of approach (at times referred to as one based upon dialectical

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[5] *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.
[6] See *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979 C to 1; *The Owners of MV 'Banglar Mookh' v Transnet Ltd* 2012 (4) SA 300 (SCA) at para 48.
[7] *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA) at para 14.

unreasonableness) and emphasised that the proper approach in such reviews was to examine the "outcome" of the award and consider whether the result was unreasonable or not. The test as postulated by the Supreme Court of Appeal was summarised as follows:

> *'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by Section 145 (2) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'*[8]

The above does not differ from the known test, namely whether the award is one that a reasonable decision-maker could arrive at considering the material placed before him. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others;*[9] *Gold Fields Mining South Africa (Pty) (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others.*[10]

[17] The primary question for determination in this appeal is thus whether the commissioner in deciding that Mr Maphisa's dismissal was substantively unfair came to an unreasonable result. A second question is whether the relief awarded by the Commissioner was unreasonable. Admittedly, the Commissioner made errors in her approach in analysing the facts. The Commissioner found that the dismissal of Mr Maphisa was substantively fair but procedurally unfair. The conclusion reached by the Commissioner was not a reasonable one if proper regard is had to all the evidence led at the arbitration. Evidence points to the involvement of Mr Maphisa. Clearly, he had been involved or connected with the theft against his employer and dismissal

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[8] *Herholdt*, at para 25.
[9] [2007] 12 BLLR 1097 (CC).
[10] [2014] 1 BLLR 20 (LAC).

was entirely justified. It would be fundamentally unfair and unjust to expect an employer to retain in his workplace an employee who has shown himself to be dishonest.

[18] The Commissioner concluded that the evidence that Mr Maphisa was guilty of misconduct was: *"circumstantial and even on a balance of probabilities does not establish that the Applicant (Mr Maphisa) was guilty as charged, directly involved or linked as the case may be to the incident."* The Commissioner found that the witnesses for both parties were credible. I agree with the court *a quo* that the Commissioner failed to appreciate the significance of the common cause evidence that Mr Maphisa was (at all material time) not at his working place but in a high security area. There was enough corroborative evidence as shown above that implicated Mr Maphisa. His own evidence was full of obvious contradictions and omissions. There are no merits in this appeal.

[19] This Court asked Appellant's counsel why would it be necessary, (should the Court be inclined to dismiss the appeal) to refer the matter back to the Second Respondent (as ordered by the Court *a quo*) in circumstances where this Court was in as good a position as the Second Respondent and/or the court *a quo* to make a final decision regarding the substantive fairness of Mr Maphisa's dismissal. Counsel was given an opportunity to address this query by way of a note. This he indeed did. The powers of this Court when hearing appeals are provided for in Section 174 of the Labour Relations Act.[11] Section 174 in part provides that the Labour Appeal Court has the power-

> *'(a)…*
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> (a) *To confirm, amend or set aside the judgment or order that is subject to the appeal and to give any judgment or make any order that the circumstances may require.'*

On the face of the above, the Appellant's counsel in his note concedes that this Court has the power as set out above. In the ordinary course where this Court holds that the wrong order was made by a court *a quo,* it may

[11] 66 of 1995 (LRA).

make the correct order itself. But in the instant matter, the Third Respondent did not launch a cross-appeal in respect of the court *a quo*'s order referring the matter back to the First Respondent for a re-hearing of the arbitration before another Commissioner. It may be that the Third Respondent was unconcerned with an order referring the matter back for a re-hearing. Appellant's counsel is of the view that should this Court make a determination disposing of this matter without the need for referral back, the Appellant will be materially prejudiced. I, however, do not agree with the above contention. I ask myself a rhetorical question, namely what shall another Commissioner decide on a matter that has served before the First Respondent, the court *a quo* and before this Court? The same evidence will be placed before the new Commissioner. He (Commissioner) shall be aware of the pronouncements by both this Court and the court *a quo*. Shall this not be a futile exercise exposing litigants to unnecessary costs?

[20] As no purpose will be served in the matter being referred back to the First Respondent to be arbitrated afresh, I believe it is only appropriate that my order confirms that the dismissal of the Second Appellant was fair.

Order

[21] In the circumstances, I make the following order:

(a) The Appeal is dismissed with the order of the court *a quo* amended to read:

"The award of the Commissioner dated 2 February 2011 under CCMA case number AJB15565-10 is reviewed and set aside and replaced with the following: 'The dismissal of the employee was fair'.

b) There is no order as to costs.

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Dlodlo AJA

I agree

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Waglay JP

I agree

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Musi JA

APPEARANCES:

FOR THE FIRST & SECOND APPELLANTS:		Mr Phineas Motaung from
		Nomali Tshabalala Attorneys
FOR THE RESPONDENTS	:	Adv A Redding SC
		Instructed by ENS Africa