IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No. : JR1734/03

In the matter between:

BAFOKENG RASIMONE PLATINUM MINE	Applicant
versus	
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	First Respondent
MOLEBALWA S N.O.	Second Respondent
NATIONAL UNION OF MINEWORKERS	Third Respondent
MASHABANE T	Fourth Respondent

JUDGMENT BY: H.M. MUSI, J

HEARD ON: 9 DECEMBER 2005

DELIVERED ON: 16 FEBRUARY 2006

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[1] This is an application brought in terms of section 145 of the Labour Relations Act No. 66 of 1995 (the LRA) for the review and setting aside of an arbitration award. The background to the dispute is briefly set out hereunder.

[2] The fourth respondent had been employed by the applicant company but was dismissed on 5 February 2002 on the basis of desertion. In effect the dismissal was *in absentia*. The fourth respondent was subsequently advised to lodge an internal appeal, which he did during March 2003, but same was dismissed, whereafter he declared a dispute with the CCMA. Conciliation failed and the dispute was referred to arbitration. Mr. Silas Molebalwa, the second respondent, was appointed by the CCMA, the first respondent, to preside over the arbitration proceedings. He issued his award on 28 August 2003 in terms of which he found that the fourth respondent's dismissal had been substantively unfair and ordered reinstatement with limited compensation. It is this award that the applicant wants reviewed and set aside. The fourth respondent, who is assisted by his union, the third respondent, opposes the application. I shall henceforth refer to the fourth respondent simply as the employee and to the second respondent as the arbitrator.

[3] The applicant's case was that the employee had absconded

from his duty for six consecutive working days from 6 February 2002 to 11 February 2002, and that according to the terms and conditions of his employment contract this amounted to desertion entitling the applicant to summarily dismiss him. Accordingly on 12 February 2002 the employee was dismissed and a letter to that effect was allegedly despatched to the postal address that he had furnished to the applicant upon his employment. Though the dismissal was made on 12 February 2002 it was with effect from his last working day being 5 February 2002.

[4] During the arbitration the applicant was represented by its employee relations manager, Mr. T.B. Ferreira, who is also the deponent to its founding affidavit in these proceedings. The employee was represented by a union representative, Mr. David Radibotseng. The applicant led the evidence of only one witness, namely Mr. Paul Herbst, its Human Resources Manager. It also handed in a bundle of documents containing *inter alia* computer records of its clocking system and statements of certain of its employees.

[5] The main ground of the applicant's attack on the award is to be found in the supplementary affidavit it filed after receipt of the record of the arbitration proceedings in terms of Rule 7A(8)(a) of the Rules of this Court and it was the focus of the heads of argument filed on behalf of the applicant as well as oral argument. It was contended that the arbitrator committed a gross irregularity in failing to advise the applicant's representative to call additional witnesses, particularly in respect of the following issues that the arbitrator himself raised in his questioning of Herbst:

5.1 Herbst made it known that he was not in charge of the clocking system and relied on the statement of one Johnny Nong, to the effect that the employee had last worked on 5 February 2002 and on the record of the clocking system to that effect.

5.2 Herbst had also relied on an e-mail from one Frank Kistler, confirming that the clocking system had been

functioning properly.

5.3 Herbst had also relied on the report made to him by one Mandla to the effect that the employee had not reported for duty from 6 February 2002 and also on the sick notes showing that the employee had been off sick on a different period covering 31 January 2002 to 4 February 2002. It was contended that the above responses had clearly alerted the arbitrator to the fact that the applicant's case would be inadequate in the absence of the evidence of the people who had personal knowledge of the matters attested to by Herbst. It was submitted that the arbitrator should have alerted the applicant to that fact and of the consequences of not calling the further witnesses.

[6] Mr. Myburgh, for the applicant, cited a line of the so-called helping hand cases where it was laid down that where the parties to arbitration proceedings are represented by lay persons there rests a duty on the arbitrator to guide and

assist them in matters of procedure and the evidentiary steps that need to be taken and that failure to do so is an irregularity rendering the award susceptible to review.

[7] In response, Mr. Goldberg, who appeared for the respondents, filed voluminous heads of argument which he later supplemented and during the hearing he handed in further supplementary heads of argument. I should state in passing that the filing of the further supplementary heads of argument, in particular, was an unusual and unnecessary step which only served to betray an unnecessary desperation to save the respondents' case.

[8] Mr. Goldberg dealt with each and every one of the cases cited by Mr. Myburgh in his heads of argument. Basically he sought to show that these cases were either distinguishable from the instant case or did not support the applicant's case.

[9] I am not persuaded that the failure to advise the applicant to call further witnesses in the instant case amounts to a reviewable irregularity. In this regard I am inclined to agree with Mr. Goldberg that the instant case is distinguishable from the cases cited by Mr. Myburgh. In fact, only the case

of **OAKFIELD THOROUGHBRED AND LEISURE INDUSTRIES LTD v McGAHEY & OTHERS** (2001) 22 ILJ 2026 (LC) deals with the failure to advise on the calling of additional witnesses to support a litigant's case. In that case the applicant's company representative had indicated that he wished to obtain and hand in a letter from the Jockey Club and also to call a Dr. Neuman, who was then not present, in support of its case. The arbitrator would hear none of that and was not prepared to give the applicant the opportunity to do so and rather hurriedly proceeded to dispose of the matter. *In casu*, it is clear that the applicant's representative had planned to call only one witness and his response when asked by the arbitrator whether he was closing his case was emphatic: "Yes I will close my case". This was perfectly in line with his plan to call only one witness. Moreover the representatives of both parties, though not legally trained, had experience in arbitration proceedings. Interestingly, during the cross-examination of the employee by Mr. Ferreira, the employee named one of the co-workers with whom he had allegedly been working on 6 December 2002

and Ferreira questioned why was such co-worker not being called to corroborate the employee's version. Yet the same representative strangely failed to appreciate the need to call further witnesses to corroborate Herbst's version when it had clearly emerged during the questioning by the arbitrator that Herbst's evidence would not be adequate.

[10] In **DIMBAZA FOUNDRIES LTD v CCMA & OTHERS** (1999) 20 ILJ 1763 (LC) Gon AJ remarked at 1779 par. 87 that a human resources manager who regularly represents his/her company in arbitration proceedings would normally be aware of the procedures and the logical steps to be taken in the process. However, in that case, unlike in the instant case, the human resources manager was appearing for the first time and clearly needed guidance. One must also bear in mind that, unlike the employee, the applicant was a large corporation and it is expected to be able to equip its representatives with enough resources to enable them to conduct its arbitrations properly or to ensure that it is represented by people who are sufficiently competent to do

so. See the remarks made in **SCHOLTZ v COMMISSIONER MASEKO N.O. & OTHERS** (2000) 21 ILJ 1854 (LC) at par. 22.

[11] A further aspect that distinguishes the instant case from the cases cited on behalf of the applicant, relates to the question of whether the merits of the dispute have been dealt with. I refer to only a few of such cases. In **CONSOLIDATED WIRE INDUSTRIES (PTY) LTD v CCMA & OTHERS** (1999) 20 ILJ 2602 (LC) an aspect that formed the core of the employee's defence (production of a medical certificate at the previous internal appeal) had not been put to the employer's witness nor did the employee himself testify about it, the evidence only emerging later in the testimony of the employee's witness. It was rightly decided that the arbitrator committed a gross irregularity in not advising the employer of the need to re-open its case in order to challenge such new evidence and of the consequences of failure to do so. It is clear that the merits of the employee's version had not been properly dealt with due to no fault on

the part of the other party.

[12] The same can be said with regards to the case of **DIMBAZA FOUNDRIES LTD v CCMA & OTHERS** *supra* where employees who had pleaded guilty at a disciplinary inquiry and had approached the CCMA only in regard to the severity of the sanction of dismissal, changed tack at the arbitration and challenged the reasons for their dismissal. The employer's representative had been unprepared for such new stance and could hardly conduct any meaningful cross-examination of the employees. The arbitrator had failed to postpone the matter even though he had been aware that that was the inevitable course to follow. It could hardly be said that the merits of the dispute had been properly dealt with in those circumstances. In the same breath the merits of the employee's case could hardly be said to have been dealt with when he, out of ignorance, failed to put the core of his version under oath as was the case in **CLAASEN v CCMA & OTHERS** (2005) 10 BLLR 964 (LC). It was correctly held that there was a duty on the arbitrator to

intervene and advise the lay employee that the only way that he could properly put his version of the disputed aspects before the arbitrator, was through evidence under oath. See also **SCHOLTZ v COMMISSIONER MASEKO N.O. & OTHERS** *supra*.

[13] *In casu* the merits of the applicant's case were fully canvassed. It should be noted that not all of Herbst's evidence was hearsay or based on the documents handed in. He was the applicant's human resources manager and the official who oversaw *inter alia* the attendance of all employees and was custodian of the relevant records. In that broad sense, he had knowledge of the matters he attested to. Though he was alerted to the employee's alleged absence by his subordinates, he testified that he knew that the employee was not present at least on 12 February 2002 when the dismissal was effected. The employee had himself brought Herbst on to the scene when he alleged that on 11 February 2002 he had told Herbst that he would be away as from 12 December 2002 to undergo an

operation. Herbst emphatically denied this and said that it could not have happened as the employee was absent on the particular day. Herbst also said that the employee only emerged on about 18 February 2002 when he was advised to lodge an appeal. Herbst was personally in charge of the whole process of dismissal and the subsequent internal appeal.

[14] Now Mr. Myburgh laid much emphasis on the fact that it was the arbitrator himself who had, through his questioning of Herbst, exposed the shortcomings in the applicant's case and then relied on same to find that the applicant had failed to discharge the onus of showing that the dismissal had been fair. Counsel seemed to imply that the arbitrator deliberately omitted to advise the applicant of the need to call additional witnesses in order that he could use the shortcomings to justify his decision. I do not agree with this contention. It has to be borne in mind that the arbitrator also had to take into account the employee's evidence and the record shows that the employee's version played an important role in the

arbitrator's decision. Such version was fully put to the applicant's witness and the employee was fully cross-examined by Mr. Ferreira. A reading of the record shows that the employee stuck to his version throughout and there has not been any suggestion that he was not a credible witness.

[15] In short, the employee insisted that he had been on duty from 6 February 2002 to 11 February 2002. He said that he had been told to produce sick notes for the period during which he was truly absent due to ill health between 31 January 2002 and 4 February 2002, which he did. He said that he had been under the impression that he was being defaulted for the latter period and was surprised when he learnt that he had been dismissed for the period during which he had been on duty. Regarding the record of the clocking system, which shows him not having clocked on the relevant dates, he said that the system sometimes malfunctions and gave examples of incidents when he had been on duty and yet the clocking system recorded otherwise. The error had

to be corrected manually, so he said. That the clocking system does sometimes malfunction, was indeed confirmed by Herbst.

[16] Now it has also been held that an arbitrator has a duty to determine the status of the documents handed in by the parties, to explain same to them and to guide them on how to go about handling documentary evidence. See **CHAR TECHONOLOGY (PTY) LTD v MNISI & OTHERS** (2000) 7 BLLR 778 (LC) at 778 - 779; **SCHOLTZ v COMMISSIONER MASEKO N.O. & OTHERS** *supra* at par. 59; **DB THERMAL (PTY) LTD v CCMA & OTHERS** (2001) 10 BLLR 1163 (LC). It was contended that the arbitrator has defaulted in this regard. Now this contention is not without merit for the arbitrator only explained to the parties how to lead evidence in regard to the bundle and nothing more. However, in my view, this defect has been cured in view of the following:

16.1 It is clear that the bundle was handed in by consent. I say this because when Mr. Radibotseng, the

employee's union representative, was asked if he had any documents to hand in, he referred to the applicant's bundle and remarked that all the documents were contained therein.

16.2 It can be inferred from the record that these documents were accepted to be what they purport to be. For example, the employee did not dispute that the clocking system recorded his attendance as reflected in the relevant document in the bundle. What he did, was to dispute the correctness of the contents of such document by saying that the machine sometimes malfunctions and would produce an incorrect record.

16.3 In his award, the arbitrator did not disregard the documents as hearsay. He seems to have had regard to them, but found that they did not provide adequate proof in the absence of evidence by the authors.

"I find the written statements of the people who were in charge

of the system to be inadequate."

He further found that there was corroboration for the employee's evidence that the system sometimes malfunctions. This is reference to Herbst's evidence on the point.

These findings are supported by the evidence.

[17] In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and whether failure to carry it out is an irregularity rendering an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Care should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other. Otherwise we would be opening the flood gates allowing every layrepresentative who has bungled his/her case to seek its re-opening by shifting the blame to the arbitrator. At the end of the day, the cardinal question is whether the

merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of section 138 of the Labour Relations Act. That question can best be answered by considering the conduct of the arbitration proceedings as a whole rather than "knitpicking through every shrapnel of evidence that was considered or not considered", as was stated in **COIN SECURITY GROUP (PTY) LTD v MACHAGO** (2000) 5 LLD 283 (LC).

[18] I have come to the conclusion that the failure to advise the applicant to call additional witnesses does not, in the circumstances of this case, amount to a reviewable irregularity.

The application is dismissed with costs.

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H.M. MUSI, J

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