



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
Case No: JR 1143/12

In the matter between:

**NATIONAL UNION OF MINeworkERS**

**First Applicant**

**BEN RAMOLEBO**

**Second Applicant**

and

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION**

**First Respondent**

**COMMISSIONER C. MOKABANE**

**Second Respondent**

**GOEDGEVONDEN COLLIERY XSTRATA COAL**

**Third Respondent**

**Heard: 11 January 2019**

**Delivered: 09 May 2019**

**Summary: Review application – circumstantial evidence-such evidence persuasive if inference sought to be drawn from evidence is consistent with all the proven facts and it is most plausible inference**

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**JUDGMENT**

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**MTHALANE, AJ**

Introduction

- [1] The applicants approached this Court seeking an order that the award issued by the second respondent (the Commissioner), under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) and under case number MP8648-11, be reviewed and set aside and that the matter be remitted to the CCMA for a hearing *de novo* before a commissioner other than the second respondent.
- [2] This Court has been approached to determine whether the conclusion of the Commissioner is based on the facts and did he reach a reasonable decision. I do not intend to set out the legal principles applicable to review applications. The Constitutional Court,<sup>1</sup> Supreme Court of Appeal,<sup>2</sup> the Labour Appeal Court<sup>3</sup> and the Labour Court<sup>4</sup> and numerous other judgments have now thoroughly grappled with the review test. I shall deal with the principles emanating from the aforesaid cases in greater detail below.

### Background

- [3] The second applicant, Ramalebo, was employed by the third respondent, Goedgevonden Colliery Xstrata Coal, (the Mine) on 21 May 2008 as a Digger Operator.
- [4] Ramalebo was charged and subsequently dismissed, following a disciplinary enquiry, for the damage of company property (namely damage to an excavator machine he was driving) and failure to report the damage to management. Ramalebo was on a valid final written warning for similar misconduct at the time of committing the misconduct.

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<sup>1</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

<sup>2</sup> *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)* [2013] 11 BLLR 1074 (SCA).

<sup>3</sup> *Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC); *Head of Department of Education v Mofokeng and Others* [2015] 11 BLLR 50 (LAC).

<sup>4</sup> *Sasol Mining (Pty) Ltd v Commissioner Ngqelini and Others* [2011] 4 BLLR 404 (LC); *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* (2010) 31 ILJ 452 (LC); *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2016] 2 BLLR 151 (LC).

- [5] Following his dismissal, Ramalebo referred an unfair dismissal dispute to the CCMA for conciliation. The matter remained unresolved, whereafter he referred the dispute to arbitration. The Commissioner found Ramalebo's dismissal substantively fair. Procedural fairness was not in dispute.

#### The arbitration proceeding and award

- [6] The Mine has a rule against damage to company property. At arbitration, Ramelebo admitted that there was a rule, he was aware of the rule and the rule was valid. However, Ramelebo denied that he breached the rule and that the rule had been consistently applied by the Mine. Ramelebo further denied that the sanction of dismissal was appropriate.
- [7] The Commissioner correctly identified the issue for determination before him as being the substantive fairness of Ramalebo's dismissal. The Commissioner was alive to the fact that the dispute hinges on circumstantial evidence and that such evidence is persuasive if the inference sought to be drawn from the evidence is consistent with all the proven facts and it is the most plausible inference. The Commissioner remained conscious of the fact that when dealing with circumstantial evidence, he is required to look at the evidence in its entirety and weigh it on a balance of probabilities.
- [8] The Commissioner considered the totality of the evidence and found that the Mine had succeeded in proving its version, on a balance of probabilities, that Ramalebo was guilty of the offence for which he was charged and dismissed. In reaching this conclusion, the Commissioner took into account the fact that it was not in dispute that Ramalebo was the last person to utilise the machine in question; that the machine was in good condition at the commencement of Ramalebo's shift and the machine was already damaged prior to the commencement of the following shift. Accordingly, the most plausible inference to be drawn from the evidence was that the machine had been damaged by Ramalebo during the course of and prior to him knocking off from his shift.

[9] The Commissioner then proceeded to consider whether the Mine had been inconsistent in its application of discipline in the workplace and found that the applicants had failed to lead any evidence to support this allegation. Lastly, the Commissioner had to assess whether dismissal was the appropriate sanction and found that it was fair, in particular when having regard to the fact that Ramalebo was on a valid final written warning for similar misconduct at the time of committing the current misconduct.

#### The applicants' Grounds of Review and Analysis

[10] The applicants' grounds for review are set out in their founding affidavit<sup>5</sup>. The applicants did not deliver a supplementary affidavit. There are, effectively, five grounds of review raised by the applicants. They are as follows:

- 10.1. The Commissioner committed misconduct and/or an irregularity by finding that Ramalebo damaged the machine in question when there was no evidence linking Ramalebo to the damage.
- 10.2. The Commissioner committed misconduct and/or an irregularity by finding that it was undisputed that Ramalebo was the last person to utilise the machine in question when this had in fact been placed in dispute by the applicants, which error resulted in the Commissioner failing to determine an issue in dispute.
- 10.3. The Commissioner committed misconduct and/or an irregularity by finding that it was common cause that the machine in question was damaged prior to the commencement of the morning shift on 9 October 2011, which issue had been placed in dispute by the applicant in that Ramalebo had left it functional and parked it at the end of his shift. The Applicant avers that due to this error the Commissioner failed to determine a material issue, which issue was in dispute.

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<sup>5</sup> See: paras 29-43 of the founding affidavit.

- 10.4. The Commissioner committed misconduct and/or an irregularity by finding that there was no evidence of inconsistent application of discipline, such evidence having been adduced before him.
- 10.5. The Commissioner committed misconduct and/or an irregularity by admitting irrelevant evidence and rejecting relevant evidence.

### Legal Principles

[11] It is trite that a review court must ascertain whether the commissioner considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at. The review court must consider the totality of the evidence then decide whether the decision made by the commissioner is one that a reasonable decision-maker could make.

[12] When applying *Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) v Commission for Conciliation, Mediation and Arbitration and Others*<sup>6</sup>, what is required in a review application is a broad-based evaluation of the totality of the evidence. Any other approach defeats the process of review contemplated in the LRA.<sup>7</sup>

[13] The Mine presented circumstantial evidence to the Commissioner. The Commissioner was alive to this. The approach to be adopted when assessing circumstantial evidence is now trite. This approach was summarised in *S v Reddy and Others*<sup>8</sup> as follows:

“In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of

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<sup>6</sup> [2014] 1 BLLR 20 (LAC).

<sup>7</sup> This approach was also adopted in *Potgieter v Tobatse Ferro Chrome and Others* (2014) 35 ILJ 2419 (LAC) at para 36.

<sup>8</sup> 1996 (2) SACR 1 (A) at p.8 C-E. See also: *Mhlanganisa Gcaza vs The State* (Case No: 1400/2016) (Unreported decision) and *Daniel Mahlalela vs The State* (Case No: 396/16) (Unreported decision).

evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft quoted dictum in *R v Blom* 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn".

[14] The approach to be adopted when an inference is sought to be drawn from other facts was summarised in *Cooper and Another NNO v Merchant Trade Finance Ltd*<sup>9</sup>. Zulman JA observed that:

"It is not incumbent upon the party who bears the onus of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the "two cardinal rules of logic" referred to by Watermeyer JA in *R v Blom* is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most "plausible" or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If, on the other hand, an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof."

#### Analysis of Evidence

[15] In addition to the facts identified by the Commissioner, the following evidence is relevant to the damage to the machine:

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<sup>9</sup> 2000 (3) SA 1009 (SCA) at para 7.

- 15.1. A few minutes after the conclusion of Visser and Ramalebo's shift, Visser was telephoned to return into the Mine due to the damage having been discovered.<sup>10</sup> Evidence was also led that the next Operator had not and could not commence with his shift due to the discovery of the said damage to that machine, and the machine was, thus, on down time.<sup>11</sup>
- 15.2. Evidence was led that the Mine operated on the basis of a 'hot seat' shift change, i.e. an operator had to remain seated until the next operator relieved him. Ramalebo had breached this procedure in an attempt, clearly, to avoid the damage being discovered while the machine was still in his possession.<sup>12</sup> Evidence was also led that Ramalebo was on a valid final written warning for the exact same transgression committed a few months prior to the incident, which provided an explanation and/or motive for him not reporting the damage that he had caused on 8 and/or 9 October 2011.<sup>13</sup>

[16] In these circumstances, having regard to the totality of evidence, the most probable and plausible inference to be drawn is that Ramalebo damaged the machine.

[17] Contrary to what the applicants assert, which assertion is not supported with reference to the record of the arbitration proceedings, there is sufficient evidence for the Commissioner to have made a finding that Ramalebo was the last person to have operated the machine and that the machine was damaged by him. The facts do not permit any other inference. Accordingly, the Commissioner's findings in this regard does not constitute misconduct and/or an irregularity.

[18] In relation to the inconsistency challenge, it is submitted that the applicants failed to provide the level of detail necessary to establish inconsistent application of

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<sup>10</sup> See: Lines 12 – 17, p. 63 of the record bundle.

<sup>11</sup> See: Lines 15 – 24, p. 13 read together with pp 17, 220 and 221 of the record bundle.

<sup>12</sup> See: Lines 21 – 22, p. 14 and lines 1 – 22, p. 15 of the record bundle.

<sup>13</sup> See: Lines 9 – 17, p. 7 of the record bundle.

discipline by the Mine, as envisaged by the Court in *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*<sup>14</sup> as well as by the LAC in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd*<sup>15</sup>. The information adduced did not serve to establish inconsistency and to absolve Ramalebo of guilt and/or the imposition of the sanction called for based on the seriousness of the misconduct committed. Accordingly, the Commissioner's finding on inconsistency does not constitute misconduct and/or an irregularity on his part.

[19] Finally, whilst the applicants raised it as a ground of review in their founding affidavit, they failed to take the issue of the Commissioner having apparently taken into account irrelevant evidence at the expense of relevant evidence further and/or to support this this with reference to the record of the arbitration proceedings. Accordingly, this ground has equally not been proven.

[20] Accordingly, in considering the totality of the evidence before the Commissioner, I am satisfied that the Commissioner's approach to the evaluation of the evidence was correct and he reached a reasonable finding.

[21] Therefore in the circumstances, I make the following.

#### Order

1. The applicants' review application is dismissed; and
2. There is no order as to costs.

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G. Mthlane  
Acting Judge of the Labour Court of South Africa

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<sup>14</sup> (2012) 33 ILJ 623 (LC), at para 10.

<sup>15</sup> (1999) 20 ILJ 2302 (LAC), at para 29.

Appearances:

For the Applicant: Ms Malebalwa Molotsi of M.S Molebaloa Attorneys Inc.

For the Third Respondent: Mr Bongani Masuku of Mervyn Taback Inc

LABOUR COURT