REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2729/2007

In the matter between:

NATIONAL UNION OF MINEWORKERS **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

ANGLOGOLD LIMITED

(SOUTH AFRICAN DIVISION) **Second Respondent**

SOMAN N.O **Third Respondent**

Heard: 18 January 2013

Delivered: 17 April 2013

Summary: Undue delay in prosecuting an application for review – Need to apply for condonation in the event of an undue delay – Review of an award wherein a collective agreement was interpreted.

JUDGMENT

PRINSLOO AJ

Introduction

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[1] The Applicant is seeking to review and set aside an arbitration award issued on 14 September 2007. The issue in dispute was whether the Second Respondent, AngloGold, acted in breach of clause 2 of the 'Interim Framework Agreement on Remuneration of Machine Operators'. The Applicant's case was dismissed at arbitration and not satisfied with that outcome, the Applicant filed an application for review on 9 November 2007.

Ad undue delay

[2] The Second Respondent raised the issue of undue delay in its opposing papers and heads of argument. Before dealing with the merits of the application, the delay in bringing this matter before Court has to be considered.

The steps taken since the issuing of the arbitration award

[3] The Applicant filed a review application on 9 November 2007 seeking to review and set aside the arbitration award issued on 14 September 2007.

[4] On 16 November 2007 the CCMA filed a notice of compliance in terms of Rule 7A(3) of the Rules of the Labour Court.

[5] During 2008, the parties' respective legal representatives liaised regarding the reconstruction of the record and the Applicant's representative indicated that he would contact the attorneys representing AngloGold to arrange a meeting to reconstruct the record.

[6] No further communication was received from the Applicant's attorneys and approximately three years later, the Applicant's attorneys requested a meeting to reconstruct the record.

[7] In December 2011, the Applicant's attorneys indicated that they would not pursue reconstruction any further and on 14 December 2011 the Applicant filed a notice in terms of Rule 7A(8)(b).

[8] The Second Respondent filed opposing papers in January 2012 and has in the opposing affidavit raised the issue of the delay and indicated that the Applicant has to file an application for condonation in respect of the delayed pursuance of the review application.

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[9] The Applicant filed its heads of argument on 8 August 2012 and the Second Respondent on 28 August 2012.

[10] The matter was enrolled for hearing on 18 January 2013.

[11] The Second Respondent did not raise the issue that the review application was filed outside the six-week period, but that it was not actively pursued subsequent to the filing of the review application in November 2007.

[12] The Applicant filed its Rule 7A(8) notice only in December 2011, more than four years after the review application was filed and this matter came before this Court for adjudication more than five years after filing of the review application. Mr Cook, appearing for the Second Respondent, emphasised that the record the Applicant eventually filed in December 2011, was the original record without any reconstruction, hence there was no reason for the delay.

[13] Despite the fact that the Second Respondent took issue with the delay in pursuing the matter and raised in its opposing affidavit and heads of argument, that the Applicant did not bother to tender any explanation for the delay. The Applicant's representative, Mr Manetsa, was unable to tender any explanation to this Court at the hearing of the matter.

The submissions made

[14] Mr Cook was seeking the dismissal of the Applicant's case on the basis that there is a delay of more than four years during which period the Applicant failed to pursue its application for review. He submitted that the delay is excessive and that the Applicant's failure to apply for condonation, should dispose of the matter and there is nothing further for this Court to decide.

[15] Mr Manetsa for the Applicant accepted that the Second Respondent indeed raised the issue regarding the need to apply for condonation in its answering affidavit, but submitted that AngloGold should have approached this Court to seek dismissal of the review application. He submitted that the Second Respondent waived its right to have the matter dismissed as it was inactive and took no steps to seek dismissal of the review application and this Court cannot assist the Second Respondent now by dismissing the review.

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[16] The Applicant submitted that there is no rule that the Applicant did not comply with and no rule that requires of the Applicant to apply for condonation.

[17] In summary, the facts are: a review application was filed in November 2007, a Rule 7A(8) notice was only filed in December 2011, the Second Respondent filed an opposing affidavit in January 2012, raising the issue of the delay and stated that it was under the impression that the Applicant has abandoned the matter and in August 2012 the parties filed heads of argument. The Applicant tendered no explanation for the delay. The Second Respondent argued that the Applicant should have applied for condonation and the Applicant argued that the Second Respondent should have applied for the dismissal of the review application.

[18] The question is whether the Applicant should have applied for condonation and whether this court could dismiss the review application on the ground that there is no condonation application filed in respect of the delayed pursuance of the matter.

[19] In *Bezuidenhout v Johnston NO and Others*[1] the Court held that:

> '...If applicant parties have unduly delayed prosecuting their applications, and fail to provide acceptable reasons for the delays, the ultimate penalty of dismissing such applications should be used in appropriate cases. This will hopefully help creating a culture of compliance and ensure that disputes are expeditiously dealt with.
>
> At the same time, the respondent party must not sit by idly and bide his time, waiting for a particular undefined moment in time when the applicant party's delay may enable him to apply to have the delaying party barred from seeking further relief, or to have the matter dismissed, by reason of delays in pursuing it. I am of the view that, if an applicant drags his feet, the respondent party also bears a responsibility to ensure that disputes are resolved expeditiously. This obligation of a respondent party is in my mind a primary one in respect of ensuring that the applicant party complies with time periods applicable to it.'

[20] In *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others*,[2] it was held that:

[1] (2006) 27 ILJ 2337 (LC) at paras 31-32.
[2] (2006) 27 ILJ 2574 (LC) at paras 7 and 14.

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'There is nothing in the Act or in rules of this court that provides that legal proceedings once instituted become superannuated by the effluxion of time for want of prosecution or that a litigant must apply for condonation on account of a delay in the prosecution thereof. That is also the position in the High Court. There is also no general time-limit under the common law within which legal proceedings must be concluded once instituted….

….

…. the rule that the court has the power to dismiss proceedings due to a delay in the prosecution thereof lies in the court's inherent power to prevent an abuse of its own process. Despite these differences, the reasoning underlying the principle that a delay may be fatal to a review application must in my view equally apply to both an applicant who delays in initiating review proceedings and one who thereafter delays in the finalization of the matter. Except for the fact that the court should possibly also have regard to the respondent's own conduct in the exercise of its discretion, the same considerations are relevant and should find application in the exercise of the court's discretion...'

[21] In *Karan t/a Karan Beef Feedlot and Another v Randall*,[3] it was held*:*

'In summary: despite the fact that the rules of this court make no specific provision for an application to dismiss a claim on account of the delay in its prosecution, the court has a discretion to grant an order to dismiss a claim on account of an unreasonable delay in pursuing it. In the exercise of its discretion, the court ought to consider three factors:

- the length of the delay;
- the explanation for the delay; and
- the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.

This is subject to the consideration that an application to dismiss is a drastic remedy, and should not be granted unless the dilatory party has been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality have been taken.'

[3] (2009) 30 ILJ 2937 (LC) at para 14.

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[22] The Court in *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others*[4] found that:

> '…. the applicant is free to bring an application to dismiss the application for review. The rules of this court make no specific provision for an application to dismiss when a party fails diligently to pursue a claim referred to the court for adjudication, but the court has recognized and adopted the rule based on the *maxim vigilantibus non dormientibus lex subveniunt*, in terms of which a party may in certain circumstances be debarred from obtaining the relief to which that party would have been entitled because of an unjustifiable delay in prosecuting their claim.…
>
> The applicant ought to have availed itself of an application to dismiss the review application, in terms of the principles to which I have referred. This is a remedy specifically designed to address an alleged abuse of this court's process in the form of unjustifiable delays occasioned by a litigant….'

[23] In *Ferreira v Tyre Manufacturers Bargaining Council and Others*[5] it was held that:

> '… the Labour Court has deprived applicants of the right to pursue remedies in circumstances where an applicant has unduly delayed the prosecution of a claim. It is now a common practice when an applicant has delayed unduly in prosecuting a review application for a respondent to bring an application dismissing the review proceedings under rule 11 of the Labour Court Rules. Similarly, where an applicant has been excessively slow in finalising the steps necessary to have a matter set down for trial once pleadings have closed, the court will also entertain such applications.'

[24] In my view, the position in respect of undue delay is as follows:

23.1 The practice when an Applicant has delayed unduly in prosecuting a review application is for a Respondent to bring an application dismissing the review proceedings under rule 11 of the Labour Court Rules;

23.2 This Court has a discretion to grant an order to dismiss an application on account of an unreasonable delay in pursuing it;

[4] (2010) 31 ILJ 1337 (LC) at paras 10-11.
[5] (2013) 34 ILJ 364 (LC) at para 12.

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23.3 In the exercise of its discretion, the Court ought to consider three factors:

i. the length of the delay;

ii. the explanation for the delay; and

iii. the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.

23.4 An application to dismiss is a drastic remedy and should not be granted unless the dilatory party has been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality, have been taken. This means that the conduct of the aggrieved party is to be considered.

23.5 There is nothing in the Act or in Rules of this Court that provides that a litigant must apply for condonation on account of a delay in the prosecution of any legal proceedings.

[25] The delay in pursuing the review application is no doubt excessive and not compliant with the primary objectives of the Labour Relations Act 66 of 1995 ('the Act'). The delay is further not explained at all and there is not any plausible reason why this matter was not pursued and finalised much earlier than August 2012, when heads of argument were filed and the matter was ready to be enrolled for hearing.

[26] It is further a matter of grave concern that attorneys and counsel represented the Applicant from the onset. Even at the arbitration proceedings, the Applicant was represented and is therefore in no position to claim ignorance of the Rules of this Court or the objectives of the Act. The Applicant and its attorneys were resting on their laurels and disregarded the Rules of this Court and ignored the object and intention of the Act.

[27] Be that as it may, the Second Respondent stated in its opposing affidavit that it heard nothing from the Applicant for a period of three years and was under the impression that the Applicant has abandoned the matter. When the Second Respondent filed an opposing affidavit, more than four years after the review application was filed, it called upon the Applicant to file a condonation

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application in respect of the delayed pursuance of the matter. The issue raised in respect of the Applicant's failure to seek condonation for the extensive delay, was persisted with in the Second Respondent's heads of argument and argument before this Court.

[28] The Second Respondent did not file an application to dismiss the Applicant's review.

[29] I am of the view that the Second Respondent should have filed an application to dismiss the Applicant's review based on the dilatoriness of the Applicant in pursuing it. The Second Respondent, however, never applied that remedy, but merely raised an issue in respect of the Applicant's failure to apply for condonation in respect of the delayed pursuance of the matter. There is no requirement that the Applicant had to apply for condonation for failing to pursue the review application expeditiously and dismissing the review on this basis seems inappropriate.

Background facts

[30] The brief history of this matter is as follows: during November 1999 the Applicant and AngloGold concluded the 'Interim Framework Agreement on the Remuneration of the Machine Operators at Anglo's Mines' (the agreement') and it was implemented until 31 August 2007.

[31] The disputed clause of the agreement is clause 2, the relevant part of which reads as follows:

> 'For the employee who has recorded shifts in the machine operator function, a payout of R 40,00 per quality-drilling shift is guaranteed.
>
> The payout specified in this agreement, is a guaranteed payout over and above existing productivity linked bonus schemes. This payout is subject to a quality-drilling shift being completed (i.e. a shift that results in a blast)'

Clause 2 should be read together with clause 3.1 which reads as follows:

> 'For purposes of payout, in terms of this agreement, the machine operator function will include all drilling functions performed in stoping and / or development operations.'

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[32] During November 2006, a small number of the machine operators refused to assist in 'charging up', which is part of the process of preparing the rock face for blasting by drilling a hole into the rock face and fitting the hole with an electric charge and explosive which is then denoted to cause a blast. AngloGold, subsequently and as a result of the refusal to assist in charging up, declined to pay the R40,00 bonus to the machine operators who did not assist in charging up, regardless of whether a blast resulted or not.

[33] On 17 January 2007, the Applicant referred a dispute to the First Respondent and the nature of the dispute was the interpretation or application of a collective agreement. The dispute concerned the interpretation of the agreement and more specifically the obligation to make payment of bonuses to machine operators who had participated in drilling shifts but who had refused to assist in charging up the rock face prior to the blast.

[34] The Applicant alleged that AngloGold has not complied with the agreement and was seeking retrospective payment of the R40,00 payout for the machine operators. The Applicant's case was that the reference in the agreement to a 'quality drilling shift' did not include the duty to charge up. AngloGold on the other hand submitted that machine operators, who refused to charge up, were not entitled to the payout, as they did not perform all the duties required of them during a shift that would qualify such a shift as a 'quality drilling shift'.

The arbitration award

[35] The arbitrator, the Third Respondent in this application, considered whether AngloGold was in breach of the agreement, and more specifically clause 2 thereof. The Applicant sought compliance with the agreement as from December 2006 until 31 August 2007 and sought payment of the bonus to all machine operators who worked on a shift resulting in a blast during the same period, regardless of whether those operators assisted in charging up or not.

[36] The Applicant's case was that machine operators were not breaching the agreement by refusing to charge up and were entitled to the payout as per clause 2 of the agreement. AngloGold's case was that charging up was part of the machine operator's job and that they were expected to drill holes, de-

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sludge these holes and to charge up the holes to enable a blast to take place and when they refused to do that, they were not entitled to the payout.

[37] The arbitrator, in her analysis of the dispute, found that the dispute centred around the question whether 'charging up' is a machine operator function.

[38] The arbitrator found that it was clear from the agreement that payouts were made to machine operators who participate in quality drilling shifts, which result in a blast. The agreement stipulated that for purpose of payout the machine operator function would include all drilling functions. 'All drilling functions' had not been defined in the agreement, but the arbitrator considered that the evidence adduced was that it in fact included drilling of holes, de-sludging these holes and charging up the holes to enable a blast to take place. A blast cannot take place without the holes being charged up.

[39] The Applicant conceded that prior to November 2006 the machine operators had been performing the function of charging up for many years and whilst they performed this function, they received their payouts.

[40] The arbitrator found that in terms of the agreement, if the machine operators failed to perform all drilling functions, they would not be entitled to payout as per clause 2, regardless of whether a blast took place or not. The machine operators failed to perform all the drilling functions, which could result in a 'quality drilling shift', and they were therefore not entitled to a payout. The Applicant's case was dismissed.

The test on review

[41] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others;*[6] 'whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.' The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[6] *(*2007) 28 ILJ 2405 (CC) at para

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[42] In *SA Municipal Workers Union v SA Local Government Bargaining Council and Others*[7] the Labour Appeal Court dealt with a review application concerning the interpretation or application of a collective agreement and noted that the question to be answered was not whether the award in issue was correct but whether the arbitrator had acted fairly, and considered and applied his mind to the issues before him. It is accepted that the reasonableness test is applicable in a review concerning the interpretation or application of a collective agreement.

[43] In *S A Breweries Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[8] the Court considered the test on review and held that:

> 'In *Fidelity Cash Management Service v CCMA and Others*[9] Zondo JP applied the *Sidumo* test thus:
>
> > "It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently."
>
> And:
>
> > "The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be

[7] (2012) 33 ILJ 353 (LAC).
[8] (2012) 33 ILJ 2945 (LC) at para 19.
[9] [2008] 3 BLLR 197 (LAC)

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> often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached."

It is against this background that the Applicant's grounds of review must be assessed.'

Grounds for review

[44] The Applicant raised one main ground of review in its founding affidavit, namely that the arbitrator based her award on evidence that was not placed before her. The Applicant's case is that the arbitrator's findings that the Second Respondent was not in breach of the agreement and that the evidence adduced was that drilling functions included drilling, de-sludging and charging up, were based on the provisions of paragraph 3.1 of the agreement, whilst no such evidence was led. None of the witnesses referred to paragraph 3.1 or the drilling functions. The arbitrator based her award on evidence not placed before her and she denied the Applicant a fair hearing and her award is unreasonable and therefore reviewable. Alternatively, she committed an irregularity in the conduct of the proceedings.

[45] What the alleged irregularity in the conduct of proceedings was, the Applicant failed to state. The Applicant failed to provide any factual basis for the alternative ground for review and it is not necessary for this Court to consider the merits of the alternative ground. This approach was confirmed in *Moraka v National Bargaining Council for the Chemical Industry and Others*,[10] where the Court held that:

> '…In setting out the grounds of review in his founding affidavit, the applicant did not set out any factual basis for those grounds, but merely set them out in the form of conclusions. Examples of this are the first two grounds of review he mentions, namely:
>
> > "2.1 The commissioner committed misconduct by making findings not justified on the evidence;

[10] (2011) 32 ILJ 667 (LC) at paras 21-23.

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2.2 gravely misunderstood evidence presented before her....'

The Labour Appeal Court has made it clear in the unreported case of *A Comtech (Pty) Ltd v Commissioner Shaun Molony NO and Others* (case no DA12/05 dated 21 December 2007) that it is not sufficient for a party simply to relate conclusions of law in the founding papers for a review application. A party must set out the factual grounds on which it seeks to base its review. While it may be excusable in a founding affidavit to state limited grounds of review and in less detail, by the time an applicant has the record of proceedings it must then make up for the deficiencies in the founding affidavit and set out the factual basis for its grounds of review in full. When it came to his supplementary affidavit, the applicant did not supplement or amend the grounds of review set out in the founding affidavit, nor did he lay a factual foundation for the grounds set out in the founding affidavit. On the approach of the LAC in the *Comtech* case, no factual basis was provided for the review application. It was only in his heads of argument that the applicant for the first time set out a factual basis for his claim.

I am bound to follow the approach of the LAC in regard to the assessment of the prospects of success and conclude that the applicant failed to provide any factual basis for his grounds of review in his founding papers. Accordingly, it is not necessary, on the basis of the *Comtech* approach, to consider the merits of the case set out later, and for the first time, in the applicant's heads of argument. Even so, I am satisfied that a reading of the commissioner's award and the record shows that the commissioner did not act unreasonably in concluding that the applicant's dismissal was substantively and procedurally unfair.'

[46] There remains thus one ground for review to be considered and that is whether the arbitrator based her award on evidence not placed before her.

[47] The Applicant's submissions as contained in the heads of argument could be summarised as follows: in coming to her decision, the arbitrator failed to take material evidence into account and had regard to irrelevant evidence. The evidence she failed to consider was that of Sandlane that the withholding of payments was not based on the terms of the agreement. The evidence the arbitrator considered relating to the work practice of machine operators was irrelevant and none of the witnesses suggested that the term 'drilling functions'

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as contained in paragraph 3.1 of the agreement included charging up, as found by the arbitrator.

[48] The Applicant's case is that the relevant evidence the arbitrator ignored, was that none of the witnesses testified that 'charging up' was indeed a drilling function as contemplated in the agreement, none of the witnesses suggested that the machine operators were in breach of the agreement and Sandlane testified that the decision to withhold the bonus was based upon work practices and not on the agreement.

[49] In his argument before this Court, Mr Manetsa submitted that the arbitrator looked outside the terms of the agreement and in doing so, she reached a conclusion she should not have reached. He further submitted that the arbitrator should not have placed any reliance on the evidence adduced by AngloGold's witnesses as they were not party to the agreement and could not in any way have assisted to interpret the agreement.

[50] AngloGold submitted that in terms of the agreement 'machine operator function' would 'include all drilling functions' and what had to be determined was whether charging up was encapsulated within the machine operator's function. Since the agreement itself provided no clarity on this aspect, it was appropriate to have regard to the surrounding and background circumstances in order to give meaning to this phrase. The witnesses did not seek to give meaning to the words used in the agreement, but they were all employed by AngloGold for many years and were all familiar with the mining operations. They were in a position to provide evidence regarding the context and application of the agreement. The evidence so presented was that there had been a practice for many years for machine operators to perform the charge up functions, it was part of their ordinary functions and was necessary to achieve a quality blast. The arbitrator correctly applied the principles relating to the interpretation of contracts and she was entitled to have regard to the evidence of witnesses to arrive at a meaning of the proper functions of mining operators.

[51] In addressing this Court, Mr Cook emphasised the fact that the Applicant called no witnesses to testify at the arbitration proceedings, but merely put versions to the witnesses called by Anglogold. This was, however, not

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evidence and the version as presented by AngloGold was to be accepted. The evidence on what drilling function were and that charging up was part of drilling functions, was uncontested.

[52] It is evident from the record of proceedings that the witness, Mr Sandlane, who is employed by AngloGold since 1974, testified that the quality shift bonus was payable when the drillers drill a hole, charge it up and it results in a quality blast for the day. There must be a quality blast for the quality bonus to be payable, so he testified. He further testified that the drillers are trained to charge up and they have been doing that for many years. The arbitrator accepted that the evidence of the witnesses insofar as it referred to 'drillers', was referring to 'machine operators' as stated in the agreement.

[53] Mr Hutton, the second witness called by AngloGold, worked at the Mponeng mine for more than 21 years and testified that a shift that resulted in a quality blast is a shift where all the machine operators did what they are required to do. This includes the drilling of holes, de-sludging the holes and charging up. Without charging up there cannot be a quality blast. Mr Hutton explained that a quality blast entails a number of tasks that have to be completed to ensure a quality blast and all those tasks are not specifically mentioned in the agreement, as it would be extreme to list every single function, but those are included in all the tasks that have to be performed in a quality blast.

[54] The last witness for AngloGold, Mr Lombard, was employed in the industry for 28 years and he testified that a machine operator's functions included drilling, de-sludging the holes and the charging of dynamite into the drilled holes. A quality blast entails many tasks and if those are not performed, it affects productivity. He confirmed that charging up is part of a machine operator's job description and it is also a long established practice.

[55] It was confirmed by the witnesses that disciplinary action was not taken against the machine operators who refused to charge up, as the relationship was important, it would have affected the business operations negatively, alternatives to resolve the issues were explored and it was anticipated that the issue would be resolved in the near future.

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[56] The ground for review to be determined is whether the arbitrator failed to take material evidence into account and had regard to irrelevant evidence. The question then is: what evidence the arbitrator should have considered and what she should have ignored in interpreting the agreement.

[57] In *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*[11] the Labour Appeal Court held that:

> 'If the collective agreement is to be interpreted and applied purely by reference to contractual principles, the strike would have been unprotected had the ballot taken place after 20 March 1997. But a collective agreement in terms of the Act is not an ordinary contract, and the context within which a collective agreement operates under the Act is vastly different from that of an ordinary commercial contract.
>
> ....
>
> On a purely contractual approach, therefore, there was no enforceable right to strike prior to 20 March 1997. Such a course of action would frustrate the overall scheme of the Act, viz to promote effective, fair and speedy resolutions of labour disputes.
>
> On the other hand, an approach based on the objectives of the Act itself, seems better suited to overcome such difficulties.
>
> …. The purpose of the Act itself is to advance economic development, social justice, labour peace and the democratization of the workplace by giving effect to its primary objects (s 1)…
>
> It is, in my view, quite clear that these primary objects of the Act are better served by the practical approach to the interpretation and application of the collective agreement as set out in the judgment of Myburgh JP, rather than by reference to purely contractual principles...'

[58] In *Food and Allied Workers Union v Commission for Conciliation, Mediation and Arbitration and Others*,[12] it was held that:

> 'What is accordingly very clear is that, where a court, or a commissioner of the CCMA for that matter, is tasked to interpret a written contract, or as in the

[11] (1997) 18 ILJ 971 (LAC) at 979E-980H.
[12] (2007) 28 ILJ 382 (LC) at para 35.

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present case, a collective agreement, it must give to the words used by the parties their plain, ordinary and popular meaning and if there is no ambiguity in the words of the contract, they must be given their plain, ordinary and popular meaning.'

[59] The dispute was whether machine operators who refused to charge up would be entitled to a payout, as per clause 2 of the agreement, when the shift resulted in a blast. The arbitrator found that it was clear from the agreement that payouts were made to machine operators who participate in quality drilling shifts, which result in a blast. The agreement stipulated that for purpose of payout the machine operator function would include all drilling functions performed in stoping and or development operations.

[60] 'All drilling functions' had not been defined in the agreement and whether charging up was encapsulated within the machine operator's function, was not clear from the agreement. The arbitrator considered the evidence AngloGold adduced in this respect. The agreement was in place since 1999 and only in November 2006 the dispute arose in respect of machine operators refusing to charge up. AngloGold employed the witnesses who testified for many years preceding the date the agreement was implemented. They all testified about the practice existing in respect of payouts to machine operators, what was included in machine operator functions and what was to be understood when reference was made to 'all drilling functions'.

[61] The uncontested evidence was that a quality drilling shift and machine operator functions included the drilling of holes, de-sludging these holes and charging up the holes to enable a blast to take place. A blast cannot take place without the holes being charged up.

[62] It was AngloGold's case that on the face of it, the agreement did not provide a definition for a quality drilling shift but that was not to say that the intention of the parties could not have been gathered from the agreement itself, coupled with evidence regarding the practice relating to the responsibilities of machine operators to charge up. The witnesses were in a position to provide evidence regarding the background circumstances and the context of the agreement and the evidence established that the practice had been established for many years that the machine operators would perform charge up functions.

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[63] The arbitrator was required to give words their plain, ordinary and popular meaning. ‘Drilling functions’ had not been described in the agreement and it was appropriate to have regard to the surrounding and background circumstances in order to give meaning to the phrase. It was therefore appropriate for the arbitrator to hear evidence to assist her to interpret the terms of the agreement and to give meaning to words used in the agreement.

[64] I am of the view that the ground for review as raised by the Applicant is without merit and losing sight of obvious points addressed in the testimony of the witnesses.

Conclusion

[65] In reviewing the arbitration award, the ground for review as raised by the Applicant must be assessed and this Court can only decide whether the arbitrator’s decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.

[66] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the ground for review raised by the Applicant, I cannot find that the arbitrator's decision fell outside of the band of decisions to which a reasonable decision maker could come. The conclusion that the arbitrator reached is one that a reasonable decision maker could have come to and it is not open to review.

[67] Both parties submitted that costs should follow the result. I can see no reason to disagree.

Order

[68] I therefore make the following order:

1. The application for review is dismissed with costs.

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Prinsloo AJ

Acting Judge of the Labour Court

Appearances:

Applicants:	Advocate Manetsa
Instructed by:	Cheadle Thompsom & Haysom
Second Respondent:	Advocate Cook
Instructed by:	Brink Cohen Le Roux Inc

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