Reportable
Delivered 0110210

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: JR 1595/08

In the matter between:

SASOL MINING (PTY) LTD	**APPLICANT**
and	
COMMISSONER M NGGELENI	**1ST RESPONDENT**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**2ND RESPONDENT**
UPUSA obo MOSES MABE	**3RD RESPONDENT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an award made by the first respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner found that Mr. Mabe, whom the third respondent represents, was unfairly dismissed. The basis for the review is that the commissioner committed a gross irregularity in the conduct of the proceedings and that as a result, he reached a conclusion which no reasonable decision-maker could reach. The attack on the award is fact-specific – the applicant contends that the commissioner erred in reaching a finding that the applicant had failed to prove

that Mabe was not residing at 3 Nirvana Lodge and that he was therefore not entitled to a travel allowance.

The facts

[2] It follows from the introduction that the facts assume some significance in these proceedings. Mabe's conditions of employment entitled him to lease premises in Kinross from the applicant, on condition that he resided in those premises with his family. The accommodation leased in terms of the applicant's policy was Flat 3, Nirvana Lodge. Mabe also qualified for a travelling allowance, on the basis that he occupied the accommodation in Kinross, in respect of his travel between Kinross and the mine. The applicant claimed that Mabe was residing in Embalenhle, and that in contravention of its policy, he was subletting the premises in Kinross. The applicant claimed further that Mabe fraudulently claimed a travel allowance in an amount of R17 575.76. After a disciplinary hearing on these charges, Mabe was dismissed. He disputed the fairness of his dismissal, and referred the dispute to arbitration.

[3] At the arbitration hearing, the applicant led the evidence of four witnesses. For the purposes of these proceedings, the relevant evidence is that of a Mr. Conradie (a security official) a Mr. Lesoetsa, also a security officer and a Ms Zulu, Mabe's subordinate and also a resident of Nirvana Lodge. Conradie testified that he visited Nirvana Lodge and that at No 3, a woman opened the door. On enquiry, she stated that Mabe did not live there. Further, neighbors that Conradie spoke to and from whom he took a statement confirmed that Mabe did not stay at No 3. Conradie stated further that on enquiry to the SAPS, he ascertained that Mabe had been arrested in March 2007 and that he had furnished his residential address as stand 9158 Embalenhle ext 12.

[4] Lesoetsa testified that he lived at No 2 Nirvana Lodge. He denied that Mabe lived at No 3, and testified that a woman named Thoko lived there with a

boyfriend and her daughter. Zulu stated that she lived at No 12 Nirvana Lodge. She testified that a woman named Thoko lived at No 3, and that Mabe did not stay there, but that he came there once a month to visit Thoko, whom she thought was Mabe's girlfriend. Mabe testified on his own behalf, and called two witnesses. These were a Mr. Mpondo, who lives at No 1 Nirvana Lodge. He testified that his neighbours were Lesoeta at No 2 and Mabe at No 3. Mabe stayed there with a woman and her daughter, Petunia. He was aware that Mabe had a business in Embalenhle and that he had another wife who lived there. A Mr. Cindi testified that he was aware that Mabe lived at Nirvana lodge with Thoko, whom he assumed to be Mabe's lover. Mabe testified that he had lived at Nirvana Lodge since 2004 and that he had a tuck shop in Embalenhle. He lived at Nirvana Lodge with his second wife, Thoko. He had an elder wife who lived in Polokwane but who stayed in Embalenhle when she came to visit. He denied subletting the premises at Nirvana Lodge. Under cross-examination, Mabe conceded that for the purposes of bail application, he gave the police an Embalenhle address, and that at his disciplinary enquiry, he had testified that he gave the police that address because his car was registered there.

The arbitration award

[5] The commissioner correctly identified that he was required to establish whether Mabe stayed at Nirvana Lodge. In his analysis of the evidence, he says the following:

> *The respondent's witness, Riaan Conradie, testified that he visited the Kinross flat on 13/7/07 and found a black lady who said the applicant was staying in Embalenhle, neighbours, Solomon Lesoetsa and Maria Zulu also testified to this effect. The applicant on the other hand, contended that he was staying at No.3 Nirvana Lodge and that he also had another property in Embalenhle, which he used as a tuck shop.*

The respondent's case is based on investigation by Riaan Conradie. It is my view that this investigation was inconclusive. He failed to get the name of the lady he met at the flat. He did not enquire as to her relationship with applicant. He also did not take a statement from her as he did with Solomon Lesoetsa and Maria Zulu.

As a result, neither the visit nor the identity of the person he allegedly met can be confirmed. I also find it strange that the investigator did not interview a caretaker or anyone responsible for the residence.

Solomon Lesoetsa testified that he stayed at flat No.2 Nirvana Lodge and he denied that the applicant stayed at No.3. He also testified that a lady called Thoko stayed with her daughter. He admitted that he never asked the lady about her relationship with the applicant. I find it strange that as a security officer employed by the respondent, he did not report the alleged unauthorised residents at flat no.3 to the authorities.

Maria Zulu testified that she stays at flat No.12 Nirvana Lodge. She also testified that a lady called Thoko stayed at flat No.3. She maintained that the applicant did not stay there but only came for visits about "once a month." I find this testimony unreliable. It is unrealistic for a tenant at a block of flats to claim to be aware of who goes in and out of the individual flats at all times.

The respondent also tended a document on page 50 of the bundle whereby the applicant had given an Embalenhle address to the police as his domicile. It is common cause that the applicant had property in Embalenhle. The issue in contention is whether he stayed in Embalenhle or in Kinross. He argues that he used the property in Embalenhle as a tuck shop, but stayed in Kinross.

The applicant on the other hand called Lucas Mpondo and Jerry Cindi who testified that he stayed at the Flat in Kinross, Lucas Mpondo testified that he stayed at flat No.1 Nirvana Lodge and that the applicant stayed at No. 3 with his second wife. He further testified that he used to catch a ride to work in the applicant's car. This gives credence to the applicant's version that he stayed in Kinross, as the applicant wouldn't have travelled from Embalenhle to Kinross and then to work.

After this analysis of the evidence, the commissioner reached the following conclusion:

In view of the above, I find that the respondent as the bearer of onus, failed to establish that the applicant was not staying at the Kinross flat. In view of this, he cannot be found guilty of claiming travelling allowance between Kinross and his workplace fraudulently, or of subletting the company property and for giving untrue or erroneous information in a written or verbal form to claim petrol money for call-outs.

Analysis

[6] The commissioner's analysis is singularly unhelpful, and the conclusion that flows from it is flawed. The commissioner appears to have considered that the mere existence of a factual dispute (in this instance, whether Mabe lived at Nirvana Lodge) must inevitably lead to a finding that the onus of proving that a fair dismissal has not been discharged. This is obviously and simply not so. It does not follow that because the accounts of the parties' respective witnesses disagree, that the party bearing the onus of proof of a fair dismissal (in this case, the applicant in these proceedings) has failed to discharge that onus.

[7] Regrettably, the commissioner's logic (or, more accurately, the lack of it) permeates many of the awards that are the subject of review proceedings in this

court. Some commissioners appear wholly incapable of dealing with disputes of fact – their awards comprise an often detailed summary of the evidence, followed by an 'analysis' that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO & others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.

[8] In *SFW Group :Ltd & another v Martell et Cie & others* 2003 (1) SA 11, the proper approach to the resolution of factual disputes was explained by the Supreme Court of Appeal (per Nienaber JA) in the following terms:

> *On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the*

witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail (at paragraph 5 of the judgment).

[9] One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual

dispute before him on this basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension. For example, Zulu's evidence that Mabe did not live at Nirvana Lodge and that he visited there about once a month is rejected on the basis that '[I]t is unrealistic for a tenant at a block of flats to claim to be aware of who goes in and who goes out of the individual flats at all time'. This observation obviously begs the question of the knowledge that one permanent resident in a block of flats will inevitably have of another and in particular, of other permanent residents. Lesoetsa's evidence that he stayed in flat No 2 and that Mabe did not stay in No. 3, on the face of it the uncontroverted and damning evidence of a neighbour of the residents of flat No 3, is disregarded by the commissioner on a similarly incomprehensible basis: "*I find it strange that as a security officer employed by the respondent, he did not report the alleged unauthorised residents at flat no 3 to the authorities."*

[10] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), Ngcobo J stated:

> *[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by section 145 (2) (a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings* (at paragraph 268).

The same considerations apply to a commissioner who fails properly to resolve an irreconcilable dispute of fact. For these reasons, the commissioner's award falls to be reviewed and set aside.

[11] The applicant's grounds for review are process-related, i.e. the applicant seeks to set aside the award on the basis of process-related reasons rather than the result of the award. Adv Anton Myburgh, writing recently in the *Industrial Law Journal*, (see 'Determining and Reviewing Sanction after Sidumo' (2010) 31 *ILJ* 1 at 16) suggests that if the act of process-related unreasonableness equates to a latent gross irregularity, then, in order to succeed on review, the applicant would have to establish no more than that the result of the award *may* (and not would) have been different if the commissioner had properly acquitted him or herself.[1]

[12] In the present instance, it is sufficient to observe that had the commissioner properly acquitted himself, he would have applied his mind to the material contradiction between Mabe's evidence at the disciplinary hearing when he stated that his reason for furnishing his Embalenhle address to the SAPS at the time of his arrest (for furnishing fraudulent payslips to third parties) was because his motor vehicle was registered at that address and his evidence during cross-examination in the arbitration proceedings when he stated that he furnished the Embalenhle address to the SAPS because his lawyer had advised him that he would not be granted bail if he furnished a lease property as his residential address. The commissioner records this evidence in his award, but simply failed to deal with what appears to be a material contradiction in Mabe's version. Had the commissioner dealt with this contradiction, and had he brought it into account in the assessment of Mabe's credibility, the result of the award may well have been different. Further, had he properly acquitted himself, the

---

[1] In *SA Veterinary Council & another v Veterinary Defence Association* 2003 (4) SA 546 (SCA), the court said the following:

> *In view of the fact that it is clear that the tribunal adopted an erroneous approach to the matter the proceedings can be saved only if it is clear that despite the irregularity Dr Krawitz was not prejudiced because the finding would have been the same if the correct approach had been applied…*(at para 40).

commissioner would have had regard to the fact that there was no challenge to the evidence of Lesoetsa (that a woman renamed Thoko lived at 3 Nirvana Lodge with her children and boyfriend), nor was there a challenge to the evidence of Zulu, who testified that Mabe did not live at No 3 but occasionally visited there.

[13] In short: the arbitrator failed to have any regard to the credibility and reliability of any of the witnesses, nor did he have regard to the inherent probabilities of the competing versions before him. That failure, and the fact that the award clearly may have been different had the commissioner properly acquitted himself, renders the award reviewable on account of a gross irregularity committed by the commissioner in the conduct of the arbitration proceedings.

[14] Mr Cook, who appeared for the applicant, urged me to substitute the commissioner's award with a ruling to the effect that Mabe's dismissal was fair. The record is not in a state for me to make any detailed assessment of the merits, nor am I in a position to make any finding based on demeanour or any other aspect that goes to their credibility. For this reason, I intend to remit the matter for rehearing before another commissioner. Finally, there is no reason why costs should not follow the result.

I accordingly make the following order:

1. The arbitration award made by the first respondent on 29 May 2008 is reviewed and set aside.
2. The matter is referred to the CCMA for a rehearing before another commissioner.
3. The third respondent is to pay the costs of these proceedings.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 17 September 2010

Date of judgment: 1 October 2010

Appearances:

For the applicant: Adv A Cook, instructed by Anthony Hinds Attorneys

For the respondent: Mr. JP Mahlangu, Mahlangu Attorneys.