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## **Rustenburg Platinum Mines Limited (Amandelbult Section) v Commission for Conciliation Mediation and Arbitration & Others (2009) ZALC 71**

**JUDGEMENT: Francis J**

### **Introduction**

This is an application in terms of **section 145** of the LRA to review and set aside an arbitration award issued by the Commissioner, in which he found that the dismissal of the employee by the applicant was substantively unfair and awarded him seven months' salary as compensation.

The review application was opposed by the third respondent, the National Union of Mineworkers (NUM) on behalf of the fourth respondent, the employee.

### **The background facts**

The employee was employed by the applicant as a miner. The carrying of cell phones underground is strictly prohibited, because the signals from a cell phone can ignite an underground blast. Employees have been dismissed in the past for such misconduct.

The employee in this case was charged with breaching the company rules in that he had allegedly carried a cell phone underground during night shift. He appeared at a disciplinary hearing, was found guilty and dismissed.

He referred an unfair dismissal dispute to the CCMA for conciliation and arbitration. At the arbitration hearing only the substantive fairness of the employee's dismissal was in dispute. The applicant commenced adducing evidence and called four witnesses, namely Sello Marcus Pasha (Pasha), Edwin Moremi Mafuleke (Mafuleke), Sebele Pilane (Pilane) and Herman Heirich Bense (Bense). An inspection *in loco* was undertaken during Pasha's evidence. The employee testified in his defense and the parties submitted written closing arguments.

### **Arbitration hearing:**

In an award, the commissioner found that the applicant had failed to prove that the employee was guilty as charged, and, accordingly, awarded him seven months' salary as compensation.

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It is clear from the evidence led that on the day of the alleged incident, two patrol men, Pesha and Mafuleka conducted an explosive search at 16 chair stairs between 5h00 and 5h30 in the vicinity of the entrance and to see whether employees were obeying the rules regarding cellphones and cigarettes etc. Cellphones are not allowed to be taken underground for safety reasons. There is a contraband box in which employees going underground should leave their cellphones or matches therein. When the employee came from underground, Pesha asked him for permission to search him. He found a Nokia cellphone in his possession and showed it to Mafuleka.

Pilane who is employed as an employee relations coordinator testified that he attended the disciplinary hearing to ensure that the procedures were followed. The applicant was consistent in the meeting out of discipline for similar offences. The employee was charged with misconduct, was found guilty and was dismissed.

The employee testified in his own defence. He testified that before he went underground he gave his cellphone to a fellow worker who was in charge of the chair lifts. He knew that cellphones were not allowed underground. When he returned from underground, one of the fellow workers, Mfikoe gave him his cellphone. He believed that Pesha saw this. When he approached Pesha, Pesha told him that he wanted to search him. Pesha searched him and found the cellphone on him. Mafuleka was doing observation duties. He was called by the human resources department and was told about the incident. He explained that the cellphone was not in his possession when he went underground but took it from Mfikoe when he returned from underground. Mfikoe made a statement.

## **The arbitration award**

The commissioner summarized the evidence led in his award. He said that the procedural fairness was not an issue and that the applicant had to prove the substantive fairness of the employee's dismissal. The only issue that had to be determined was whether the employee had breached the rule. The existence of the rule was not in dispute. If the rule was found not to have been breached, the employee's dismissal would be substantively unfair. If it was breached, the next issue would be around the consistency and whether the sanction imposed was appropriate.

The commissioner said that he had to specifically scrutinize the versions of the applicant's witnesses and that of the employee. He then dealt with the evidence led by the parties. It is not necessary to repeat this save to say that Pesha searched the employee and found the cellphone on him whilst Mafuleka kept the employees under observation. The employee denied that he had the cellphone on him whilst he was underground and he had collected it from Mfikoe the chair lift operator. The commissioner said that he had to look at the crucial parts of their testimonies and analyze it to see whether it was **reasonably probably true**. The commissioner proceeded and dealt with the discrepancies around the time when



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the employee was searched, the surveillance camera and at what stage the employee was searched. He said that the full video should have been used to clarify the doubts that existed.

The commissioner said that having considered the totality of the evidence he could only arrive at the following logical conclusion that the employee was indeed searched and found in possession of the cellphone; that it could not be said that the employee was the person identified on the video footage by witnesses and that the witnesses possibly searched someone else and got their facts possibly wrong to say that the said person was the employee. The commissioner said that the other problem that he had was even the chairlift operators were not appearing on the edited footage. As they are working around the cameras, it is possible they could have been captured. If Mfikoe, the chair lift operator, was indeed on duty and acted as alleged by the employee, the camera could have captured him. If the applicant could have shown him the whole footage of 5h00 to 5h30 without editions, it would have helped him to get a better picture. By showing only the selected parts did not help to erase possible **reasonable doubts**.

The commissioner said that the employee's version was **reasonably probably true**. He could have been given the cellphone by Mfikoe. Pesha could not have seen this taking place because of the manner in which he was positioned. Mafuleka on the other hand who was well placed testified that he concentrated only on the employees emerging from underground by means of chairlifts. There was no evidence that he also concentrated on events from behind his back at the time. The applicant did not succeed to prove that the employee indeed committed misconduct for which he was charged. He could not agree that there was conclusive or reasonable evidence that the employee indeed committed the misconduct with which he was charged. Pesha and Mafuleka did not corroborate each other at all concerning the actual observation and the actual search of the employee. Each of them was not noticed by the other when carrying out the task they each carried. They further gave to some extent contradictory and unconvincing evidence on the issues of time on which the employee was noted and the times on when he was searched as well as the actual happening of the search itself.

They are **single witnesses** to events applicable to the spot where they were posted. Although the evidence of a single, uncorroborated witness is also acceptable, he could not do so when taking all factors of the case into account. The two witnesses altered some parts of their versions once under cross examination and this placed doubt on the accuracy of their testimony.

The commissioner said that he could not therefore reasonably and fairly arrive at the conclusion that the applicant succeeded to prove that the employee indeed committed the misconduct with which he was charged.

The commissioner concluded that the employee's dismissal was **procedurally fair** but **substantively unfair** and awarded him seven months compensation.



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## **The review application**

The applicant has raised several grounds of review. It is not necessary for purposes of this judgment to deal with all the grounds of review. The applicant contended that in finding that the dismissal was substantively unfair and making the award in question, the commissioner committed several reviewable irregularities by exceeding his powers and/or making findings that were not rational or reasonable in relation to the reasons given or the material properly before him, and/or committed gross irregularities regarding the arbitration proceedings. The commissioner used the **wrong standard of proof** in assessing the evidence and in doing so committed a gross irregularity and thereby produced an award that cannot be said to be reasonable in the circumstances. The commissioner's finding that the dismissal was substantively unfair is not one that a reasonable decision maker could make.

## **Analysis of the evidence and arguments raised**

The court held that it was common cause that the applicant has a policy in the workplace which prevents employees from taking cellphones underground for safety reasons. The employee was aware of the rule and did not dispute the reasonableness and fairness thereof. His defense was that he did not breach the rule in that he gave the cellphone to the chairlift operator before he went underground and received it when he came back to the surface. He was found with a cellphone in his possession but said that he did not take it underground. No video footage recorded that the cellphone was given back to him by Mfikoe.

The applicant called four witnesses in support of its case. The applicant's main witnesses were the security guards who conducted explosive searches on 9 May 2006. The fourth witness testified about the issue of consistency and the matter relating to Ngwato who was also found in possession of a cellphone. He was dismissed but on appeal his dismissal was overturned and substituted with a final warning. The issue of consistency is not an issue in this matter since the employee has not filed a counter review.

The commissioner found that the applicant had failed to prove that the employee was guilty of the misconduct and that his dismissal was therefore **substantively unfair**. He found that the employee's version was **reasonably possibly true**.

One ground of review raised by the applicant is that the commissioner misdirected himself on the evidentiary test. The commissioner when analyzing the different versions placed before he said the following:

The court held that it is trite that the test to be employed to decide whether an employee is guilty of the misconduct alleged by the employer at the arbitration hearing is on a **balance of probabilities**. The



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commissioner did not apply the civil law standard of proof which is on a **balance of probabilities** but the criminal law standard of proof which is **beyond a reasonable doubt**.

This Court has previously held that when a commissioner errs by applying a standard stricter than proof on a balance of probabilities, the award is reviewable. See **Potgietersrus Platinum Ltd v Commission for Conciliation Mediation & Arbitration & others (1999) 20 ILJ 2679 (LC)**; **Markhams (a Division of Foschini Retail Group (Pty) Ltd v Matji NO & others [2003] 11 BLLR 1145 (LC)** and **Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others [2006] 9 BLLR 833 (LC)**.

The court held that the commissioner has failed to decide, on the evidence before him, the preponderance of probabilities given the conflicting versions presented by the parties during the arbitration proceedings. It cannot be said that the commissioner's finding is that which a reasonable decision maker would have made.

The application stands to be granted. The arbitration award was reviewed and set aside.

