

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: JR570/2006

In the matter between:

**RUSTENBURG PLATINUM MINES LTD
(UNION SECTION)**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

HLOKWE, R N.O

Second Respondent

NATIONAL UNION OF MINeworkERS

Third Respondent

PHOFU, AM

Fourth Respondent

JUDGEMENT

NGALWANA AJ

[1] This is an application for the review and setting aside of an arbitration award made by the second respondent on 22 February 2006 under case number LP5752/2003 and under the auspices of the first respondent.

- [2] The second respondent found that the fourth respondent's dismissal by the applicant had been "*procedurally fair but substantively unfair*". He then ordered that the fourth respondent be re-instated retrospectively to 5 September 2003 and that he be paid his lost salary in the amount of R158 971,50.
- [3] The applicant submits that the second respondent's finding is susceptible to review on at least four grounds. The first is that he erred in "*writing off*" the evidence of Matlale and Seleka on the basis of contradictions relating, on the one hand, to who "popped out" the R400 to pay off the fourth respondent in order to avert an arrest of Seleka by the fourth respondent for having stolen clothing and some cash at the hostel and, on the other, whether both witnesses had returned to the hostel after being dropped off by the fourth respondent at a soccer field. The fourth respondent submits that the second respondent did not "*write off*" the evidence of the two witnesses but rather considered it and then dismissed it as being improbable.
- [4] Secondly, it is submitted by the applicant that the second respondent committed a gross irregularity in finding in favour of

the fourth respondent on the basis of his past disciplinary record and work performance. Since consideration of the fourth respondent's "*merit awards for his good work and for not accepting bribes*" in the past "*substantially influenced*" the second respondent's conclusion, so the submission goes, this is sufficient basis upon which the award falls to be set aside because this is irrelevant evidence to the charge of whether or not the fourth respondent had accepted a bribe on the facts of this case. The fourth respondent's counter to this is that this exemplary disciplinary record was not contradicted at the arbitration hearing. In any event, so the argument goes, past disciplinary record is relevant where the acceptance of a bribe is denied by a person who has in the past received awards for not doing so.

[5] The third ground upon which the applicant submits the award falls to be set aside is that he failed to assess the probabilities of the evidence advanced before him by the various witnesses. The fourth respondent disputes, with reference to passages in the award, that the probabilities were not assessed by the second respondent.

[6] The fourth ground advanced is that the second respondent exceeded his powers in granting the fourth respondent 18 months'

back pay, in excess of the 12 months' statutory limit. The fourth respondent counters that it is competent for this court to grant back pay exceeding 12 months' salary since this is not compensation which is capped by section 194 of the LRA.

- [7] It is not necessary for me to deal with the second, third and fourth grounds of review as I am satisfied that the second respondent's award falls to be set aside on the basis of the first. The common theme of the evidence of Matlale and Seleka is that the fourth respondent was paid R400 by at least one of them and that the purpose for that payment was to secure Seleka's release from an arrest by the fourth respondent for the theft of clothing and cash he had committed. There was also talk of Seleka desperate to keep his job. Seleka's evidence in this regard was, *"I paid the man the money in order that he can release me I must not be arrested. And that did not help anything because I lost my job"*. Matlale said in evidence, *"[Seleka] wanted me to borrow him money to pay to Mr Phofu to release him, because he was afraid that he was going to loose his job"* [sic]. It is in my view immaterial who made the payment. What is clear is that payment was made in order to avoid an arrest and to keep a job. The acceptance by the second respondent of the fourth respondent's bare denial on the basis of

past disciplinary record, when pitted against the evidence of two witnesses who have not been shown to have any discernible motive to frame the fourth respondent in a bribery scandal, is in my view not justifiable. The contradictions in the evidence of Matlale and Seleka as regards who paid the fourth respondent and whether they both returned to the hostel or went their separate ways to their respective homes after payment of the bribe are, in my view and when viewed objectively in light of all the evidence and taking into account the probabilities, quite immaterial.

- [8] Counsel for the fourth respondent urged that this court substitute its own decision for that of the second respondent in the event of a finding that the award is susceptible to review. His reason for this submission was that the applicant should not be allowed a second bite at the arbitration cherry by calling new witnesses and leading new evidence it had not led at the initial arbitration hearing with a view to repairing a case that was, in his view, not competently prosecuted at the initial arbitration. For this submission, he cited some authority. In my view that is an issue that the fourth respondent can raise at arbitration and need not detain us here.

- [9] In the result, I make the following order:

- [a] The second respondent's arbitration award dated 22 February 2006 under case number LP5752/2003 is hereby reviewed and set aside;
- [b] The matter is referred back to the first respondent for a *de novo* determination before a different commissioner;
- [c] The third and fourth respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

Ngalwana AJ

Appearances

<i>For the applicant:</i>	<i>Mr AT Myburgh</i>
<i>Instructed by:</i>	<i>Leppan Beech Incorporated</i>
<i>For the 3rd respondent:</i>	<i>Mr A Goldberg</i>
<i>Instructed by:</i>	<i>Nomali Tshabalala Attorneys</i>
<i>Date of hearing:</i>	<i>26 June 2007</i>
<i>Date of judgment:</i>	<i>2 July 2007</i>