

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT CAPE TOWN**

Case No. C10/2010

In the matter between:

**NATIONAL UNION OF  
MINEWORKERS obo  
BENJAMIN GERHARDUS  
JONATHON**

Applicant

And

**CCMA  
Commisisoner Hendrik Olifant  
SISHEN MINE**

**1<sup>st</sup> Respondent**

**2<sup>nd</sup> Respondent**

**3<sup>rd</sup> Respondent**

Date of Hearing: 10 March 2011

Date of Judgment: 05 July 2011

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JUDGMENT

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GUSH, J.

- The applicants in this matter apply to review and have set aside the arbitration award made by the second respondent in which award the second respondent found that the dismissal of the second applicant was substantively fair.
- The second applicant was employed by the third respondent as a plant operator on 1 January 2007 and dismissed by the third respondent on 21 September 2009 pursuant to a disciplinary enquiry.
- The background to the second applicant's dismissal is as follows:
  - On 22 August 2009 the second applicant was on duty at the third respondent's premises. According to the second applicant the foreman had approached him and given him his soap and coffee ration after which the second applicant decided to leave work. He indicated that he needed to find a bag in which to put the items the foremen had given him and had come across a packet containing a spotlight, a rivet gun, a box of rivets and a roll of insulation tape. His own explanation was that he had looked inside the bag and had seen what it contained but despite this put his coffee and soap in the bag and took the bag and its contents with him to the gate. *"Dieselfde tyd het my voorman nou vir my seep en koffie gebring. Okay so... nou wil ek met die goed loop... ek kyk wat is daarin en dan kom ek toe mos nou op goed af wat in die sakkie, maar so vat ek sommer maar my koffie en ek steek dit in die sak. Okay so loop ek dan..."*
  - The second applicant having proceeded to the gate but before he had left the premise was approached by the security personal on duty at

the gate. The third respondent's security staff were conducting searches of employees leaving the premises.

- The second applicant had approached the gate but had stopped short of the gate close to the turnstiles. When the second applicant didn't proceed through the gate the security personnel approached by who indicated him and indicated that they wished to search him.
- The applicant in response had indicated that he wished to return to the to the mine premises in order to make a telephone call. The security personnel offered him the use of the telephone at the gate and advised the second applicant that they were required to search him first before he went back to the mine premises.
- The security personnel explained that on searching the second applicant they found him to be in possession of the plastic bag. The second applicant explained that the bag contained soap tea and coffee. The security guards explained that the second applicant was reluctant to be searched and was adamant that he wanted to return to the mine premises from the gate with the plastic bag.
- The security guards insisted in searching the second applicant and his plastic bag. The security guards opened the bag and found that it contained in addition to the soap tea and coffee, the spotlight, rivet gun, the box of rivets and the roll of insulation tape. The second applicant was unable to produce any documentation authorizing him to be in possession of the goods in question viz the spotlight, rivet gun, the box of rivets and the roll of insulation tape. The second

applicant on being questioned told the security personnel about the soap tea and coffee but did not mention the spotlight, spotlight rivet gun rivets or insulation tape.

1. The second applicant was charged with misconduct described in the notice of the disciplinary hearing as follows:

“DIEFSTAL: Goedere en gereedskap word in person se besit gekry sonder ‘n wettige hek vrystelling”

The third respondent found the second applicant guilty of the misconduct as charged and dismissed him.

1. The second applicant referred a dispute to the first respondent claiming that his dismissal was substantively unfair.
1. The dispute was arbitrated by the second respondent who found that the second applicant had intended to remove the equipment that the second applicant was aware of the rule he was found guilty of contravening that the rule was reasonable and that the second applicant was guilty as charged. The second respondent further concluded that the second applicant’s misconduct displayed an element of dishonesty and accordingly in the light of the evidence adduced by the third respondent dismissal was the appropriate sanction.
1. In the founding affidavit the applicants aver that the second respondent “committed certain gross irregularities” and “came to a conclusion to which no reasonable arbitrator could come” and that accordingly that the award should be set aside.

1. The applicant's grounds of review are listed as follows:
  - *“The arbitrator misconstrued either the charge and/or the nature of the misconduct involved”*;
  - The third respondent had not established the breakdown of the employment relationship; and
  - The existence of the rule had not been established.
1. In the supplementary affidavit filed by the applicants the applicants a further ground of review that the charge was not supported by the evidence.
1. It is trite that there is no appeal against an award arbitration of a commissioner in. The court may only interfere with an award if it believes that there is a defect in the award in that the commissioner committed misconduct in relation to his duties as an arbitrator; committed a gross irregularity in the conduct of the arbitration proceedings or exceeded his powers as a commissioner. An award may also be set aside if the award is one that “ a reasonable decision make could not reach”
1. Even if the court believes that the decision is wrong it is not entitled to review and set aside the award unless it is shown that it is an award that a reasonable decision make could not reach or that there is a defect in the award as set out in the LRA.

1. The second respondent's award is reasoned, reasonable, lawful and procedurally fair. He has carefully analysed the evidence and has considered the probabilities of the evidence placed before him.
1. The second respondent in analysing the evidence concluded that the second applicant had intended to remove the items despite the submissions made on his behalf that the second applicant was apprehended before he had left the premises. The second respondent found further that the second applicant had attempted to avoid being searched. Based on the evidence set out in the record of the arbitration these conclusions are entirely reasonable and justified.
1. The second respondent went on to consider whether or not the second applicant was aware of the rule he had transgressed, whether the rule was reasonable and whether dismissal was the appropriate sanction. He concluded that the applicant was aware of the rule, that it was reasonable and that dismissal was the appropriate sanction given the seriousness of the misconduct and that it involved dishonesty.
1. In considering whether the second respondent's award is reviewable as opposed to being appealable in the light of the evidence placed before the second respondent and the applicants' grounds of review, it is necessary to take into account what was held in *Edcon v Pillemer* and *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* respectively viz:

*Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a*

*reasonable decision maker could arrive at considering the material placed before him.”*

And

*Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in “judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions”. This Court in Bato Star recognized that danger. A judge’s task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”*

1. I am not satisfied that the award of the second respondent is an award which can be said to be a decision that *"a reasonable decision maker could arrive at considering the material placed before [her]."*
1. In the circumstances I make the following order:
  - The applicants’ application is dismissed;
  - There is no order as to costs.

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GUSH J

Appearances:

For the Applicants: N Cloete, Neville Cloete Attorneys Inc.

For the 3<sup>rd</sup> Respondent: P. A. Koeberg,