**IN THE LBOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**REPORTABLE**

**CASE NO: JR 888/05**

In the mater between:

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| **NATIONAL UNION OF MINEWORKERS** | **FIRST APPLICANT** |
| **SAMSON NGOBENI N.O** | **SECOND APPLICANT** |
| **DANIEL MASHABANE** | **THIRD APPLICANT** |
| **AND** | |
| **COMMISSION FOR CONCILIATION MWDIATION AND ARBITRATION** | **FIRST RESPONDENT** |
| **JONAS SHIPALANA, N.O** | **SECOND RESPONDENT** |
| **FOSKOR** | **THIRD RESPONDENT** |

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**JUDGMENT**

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**MOLAHLEHI AJ**

**Introduction**

[1] This is an application in terms of which the applicant sought to review and set aside the arbitration award of the Second Respondent (the commissioner) issued under case number LP 2981 on the 8th March 2005. Prior to their dismissal for allegedly stealing brass,

copper and aluminium (precious metals) Mr Ngobeni and Mr Mashabane, who I will interchangeably refer in this judgement as “employees” or where appropriate use their specific names, depending on the context, were employees of the third respondent.

[2] It is common cause that employees at the third respondent’s work place were permitted to purchase scrap metals including precious metals. The third respondent’s version is that at a particular point in time it introduced a rule prohibiting the purchase of precious metals by its employees.

**Background facts**

[3] On the 8th November 2001, the employees' vans were searched by Mr Maake, the security officer at the gate of the third respondent and were found with precious metals.

[4] The third respondent disciplined and dismissed the employees for contravening a rule prohibiting the purchase of precious metals by its employees. Mr. Swart, a foreman in the crusher department who was the supervisor of the two employees testified that the rule was introduced through a memo which he read to the employees at one

of their staff meetings. His version is that he read the memo to the employees on the 19 November 2001.

[5] The third respondent's employees were required to sign an attendance register for every meeting convened by management, as proof of attendance.

[6] Mr. Maake, testified that on the 8 November 2001, whilst searching Mr. Mashabane's van he saw Mr. Ngobeni's van suddenly take a U-turn. According to him Mr. Ngobeni took a U-turn; "*as they realized that we were searching the Isuzu bakkie.*" Another van was dispatched to follow Mr. Ngobeni's van which was searched on arrival at the gate.

[7] After offloading the sieves, according to Mr. Maake, they found that both employees had respectively covered the precious metals with black plastic bags.

[8] The applicants on the other hand denied knowledge of the rule prohibiting the purchase of precious metals to employees and disputed that they attended a meeting where the memo introducing the new rule was read. In their defense the employees denied the

theft of the precious metals and stated that they had purchased them from a person authorized to do so by the third respondent.

[9] They contended further that they were not aware of the rule that prohibited the purchase of the precious metals until the day when they were stopped at the gate and accused of stealing. They further denied having been briefed about the memo containing the rule prohibiting the sale of the precious metal being read to them.

**Procedural fairness**

[10] The employees through their union challenged the fairness of their dismissal on the basis that they were subjected to two disciplinary hearings before two different chairpersons. The chairperson of the first hearing (the chairperson) after completing the hearing recused himself without delivering his verdict. No reasons were provided for his recusal.

[11] The employees contended that the commissioner failed to realise the fact that the chairperson recused himself before delivering his judgement in order to afford the third respondent another

opportunity to bring new evidence to the prejudice of the employees.

[12] The commissioner in dealing with the issue of the recusal of the chairperson found that the third respondent failed to explain why he (the chairperson) recused himself without giving a verdict. However, having arrived at this conclusion, the commissioner found that the employer had nothing to do with the withdrawal and the failure of the chairperson to deliver a verdict. In this regard he concluded that:

> *"Fairness requires that the presiding officer in a disciplinary hearing be a neutral person, and if indeed the presiding officer was neutral, then, it will also be correct for me to assume that the employer had nothing to do with his failure to deliver a verdict of the first hearing. In addition, the union did not present evidence to show that the failure to deliver a verdict of the first hearing was because of the influence of the employer. "*

[13] It is trite law that once an employee has established that he or she was dismissed, the employer bears the onus of proving that the dismissal was both procedurally and substantively fair.

[14] In finding that the union did not produce evidence to show that the withdrawal and the failure to produce the verdict by the chairperson was due to the influence of the employer, the commissioner incorrectly shifted the burden of proof on to the employees. In this regard the commissioner misdirected himself and committed a gross irregularity. The commissioner misdirected himself in that he shifted the onus to the employees to proof that the withdrawal of the chairperson was not fair. In my view it was the employer who was supposed to have shown that the withdrawal and failure to issue the verdict had no bearing on the fairness of the dismissal of the employees.

[15] The issue the commissioner had to determine concerned the fairness of the withdrawal without reasons and issuing of the verdict. The commissioner failed to appreciate the issue before him and misdirected himself in concluding the issue on the basis of the neutrality of the chairperson rather than the fairness of the

withdrawal particularly taking into account that the hearing had been completed. The neutrality of the chairperson does not necessarily guarantee that the third respondent could not have played a role in the recusal of the chairperson. The failure by the commissioner to investigate this issue when it was properly before him, amounted to a reviewable irregularity.

[16] The commissioner did not deal with the issue of the second disciplinary hearing which was raised by the employees. As stated earlier the employees contended that it was not fair for them to be subjected to two disciplinary hearing on the same charges.

[17] The principle governing this issue was dealt with in the case of *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC) and Branford *v Metrorail Services (Durban) & others* (2003) 24 ILJ 2269 (LAC). In the *BMW case* Conradie JA, with Nicholson JA concurring said at para 12:

> *"Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so."*

[18] In delivering the minority judgment in the same case Zondo JP adopted the same approach and stated:

> *"14 The concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interest of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case."*

[19] In this case the commissioner was required to determine whether or not the second hearing against the employees was fair in the circumstances. Had he considered this issue, he may have arrived at a conclusion that in the circumstances of this matter the convening of the second hearing was unfair. Thus the commissioner failed to apply his mind to an issue which was properly placed before him and in doing so committed a gross and reviewable irregularity.

[20] It was further contended that the commissioner failed to apply his mind to discharge his duties in that he ignored the clear and undisputed evidence by the applicant that the third respondent had

acted contrary to its own disciplinary procedure in particular clause 21.3.4 of its disciplinary code. In this regard the employees argued that the third respondent contravened the disciplinary code by appointing a person form outside to conduct the disciplinary hearing instead of one its employees.

[21] In the case of *Highveld District Council v CCMA and Other* (2002) 12 BLLR 1158 (LAC), the Labour Appeal Court held:

> *"Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in Section 188 (1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair…..When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair."*

[22] A similar approach was adopted in the case of *Leonard Dingler (PTY) Ltd v Ngwenya* (1999) 5 BLLR 431 (LAC), where Judge Kroon JA stated:

> *"In my judgement, and having regard to all circumstances, the time when and the manner in which the apparent hearing was held, while not strictly in accordance with the appellants disciplinary code, were substantially fair, reasonable and equitable."*

[23] The Supreme Court of Appeal (SCA) in *Denel (PTY) Ltd v D.P.G Vaster 2004 (4) SA 481 (SCA),* adopted a different but a distinguishable approach to the above mentioned cases. The SCA held that the employer was bound to follow a disciplinary code which it had incorporated into the employment contracts with its employees. The *Denel* approach was, with due respect, incorrectly followed, in the two Public Sector arbitration awards of *PAWUSA v Department of Transport (PSCBC) 51-04/05* and *NEHAWU and DENOSA v Department of Health, Northern Cape (PSCBC) 16-03/04*.

[24] In my opinion the *Denel* decision is distinguishable from the *Leonard Dingler's* case in that in the *Denel case* the SCA was

dealing with a situation where the disciplinary code was incorporated into the contract of employment of each of the employees. In this regard the court held in dismissing the contention of the appellant that it was not correct that the only thing required of the parties was that they act fairly towards one another, despite the contractual obligation requiring something more.

[25] It is also important to note that the matter in the *Denel's case* came before the SCA on appeal from the Pretoria High Court where the court was faced with having to decide on damages for breach of contract of employment and damages for ***injuria***. The claim for ***injuria*** was dismissed and the court confined itself to damages for breach of contract.

[26] In the light of the above I am of the opinion that the applicable law is that as stated in both the Highveld District Council and Leonard Dingler's cases. See also, *Khula Enterprise Finance Limited v Madinane and others* (2004) 4 BLLR 366 (LC) and *SA Tourism Board v CCMA and Others* (2004) 3 BLLR 272 (LC).

[27] In this case the commissioner failed to scrutinize the procedure followed and to evaluate the circumstances in which the employer

deviated from its own code by appointing an outside chairperson. Thus the commissioner failed to apply his mind to an issue that was properly put before him for consideration. This, in my view resulted in the employees being denied a fair hearing.

**SUBSTANTIVE FAIRNESS**

[28] The employees contended that the commissioner committed a gross irregularity and exceeded his powers in that, he considered irrelevant evidence, misdirected himself in the conduct of the arbitration proceedings and in the analysis of the evidence presented. They further contended that the commissioner completely ignored their evidence and the probabilities that favored them.

[29] They also contended that the commissioner accepted the evidence that the individual applicants were aware of the rule prohibiting the possession of precious metals even though Mr Swart (their supervisor) could not submit proof that he had informed them of the rule.

[30] In his analysis of the evidence presented before him the commissioner said:

> *"The dismissal of the two Applicants in this case revolves on whether they knew of the rule or they could reasonable (sic) have been expected to know the rule prohibiting the sale of scrap from precious metals."*

The commissioner went further to say:

> *"Mr Sibuyi has dealt with inconsistencies of some of the witnesses in his closing arguments, although I agree with some of them, however, they do not address the issue of whether the Applicant knew of the prohibition …"*

[31] The burden of proof, which consists of both the legal and evidential burden of proof, is that of a balance of probabilities, and in accordance with the provisions of s 192(2) of the LRA, the employer must show, on a balance of probabilities, that the dismissal of the employees was procedurally and substantively fair.

[32] The first inquiry in determining whether a dismissal for misconduct was substantively fair is whether the employee has breached a workplace rule or standard and if so whether or not:

> *"(I) it was a valid reasonable rule or standard;*

*(ii) was the employee aware, or could have reasonably be expected to have been aware, of the rule or standard;*

*(iii) the rule or standard has been consistently applied by the employer*."

[33] In this matter, the commissioner correctly found that what he was required to consider was whether or not the employees "*knew of the rule or they could reasonable (sic) have been expected to know the rule prohibiting the sale of scrap from precious metals*". It would seem from his conclusion that he rejected the evidence and the argument of the third respondent that its employees knew of the prohibition against the purchase of precious metals.

[34] After analyzing the evidence of Mr Swart, the foreman who claimed to have read the memo in which the employees were supposed to have been informed about the prohibition of the purchase of scrap from precious metals, the commissioner concluded that there was no proof that the applicants were present when the memo was read. However, the commissioner does not make a clear ruling as to whether he rejects the evidence of Mr Swart and found that the employees did not have knowledge of rule. He in this regard stated: *"However, this is not the sole issue to be dealt with in this case."*

[35] It seems safe to interpret the commissioner's finding on this aspect to be that the company has failed to proof that the employees were aware of the rule. Having arrived at this conclusion the commissioner proceeded and dealt, firstly with the fact that the employer's representative did not deal with the reaction of the employees when they were confronted with search and the manner in which they had packed their loads and concluded that these are factors which were most relevant to the enquiry regarding the issue of whether or not it can be assumed that they ought to have known of the existence of the rule.

[36] The commissioner found that by virtue of the way the two employees reacted when confronted with the search and the manner in which they had packed their vans was indicative of the fact that they ought to have known of the rule prohibiting the purchase of precious metals. It was on these bases that the commissioner found the dismissal to have been substantively fair.

[37] It is apparent that the commissioner in arriving at his decision as he did relied on circumstantial evidence to determine the implied knowledge of the rule on the part of the employees.

[38] Hoffman & Zeffertt in *The South African Law of Evidence* (5th ed) at 93 set out the principles governing the use of circumstantial evidence in arriving at a decision. In this regard the learned authors quote Watermeyer JA in *R V Blom 1939 AD 288* at 302-3 as having said:

> "*(a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*
>
> *(b) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."*

[39] The leading cases on circumstantial evidence in a criminal law context is *R v Blom* (supra) and in civil cases is *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982 (2) SA 603 (A).*

[40] The onus in civil cases is discharged if the inference advanced is the most readily apparent and acceptable inference from a number of possible inferences. Arbitrator Cohen in *Victor and Another v*

*Picardi Rebel (2005) 26 ILJ 2469 (CCMA) 2003 ILJ 2451*, held that a distinction between a permissible inference and a mere conjuncture or speculation must always be born in mind.

[41] It has been held that the process of drawing inferences can be very dangerous. Whilst the possibility of error in direct evidence lies in a witness being mistaken or lying about the facts, the use of circumstantial evidence involves a potential error which is that a tribunal or the court may be mistaken in its reasoning. In this regard the Hoffman and Zeferrett (supra) have this to say:

> *"The possibility of error in direct evidence lies in the fact that the witness maybe mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the Court may be mistaken in its reasoning. The inference that it draws maybe sequitur, it may overlook the possibility of other inferences which are equally probable or reasonably possible. It some times happens that the trier of facts at having thought at a theory to explain the facts that he may tend to overlook inconsistent circumstances or*

*assume the existence of facts which have not been proved and cannot legitimately be inferred."*

[42] The learned authors further quoted, Lord Wright in the English case of *Caswell v Powell Duffy Collieries Ltd* [1939] 3 All ER 722 (HL) at 733 as having said:

> *"There can be no inference unless there are objective facts from which to infer other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other, cases the inference does not go beyond reasonable probability. But is there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjuncture."*

[43] It is apparent from the award that the commissioner once having taken the facts from the two distinct incidences (that of Ngobeni and Mashabane), concluded that the only inference that could be drawn was that the conduct and the manner in which the employees had packed their vans, was too "coincidental" and that it pointed to the fact that the employee aught to have known of the existence of the rule.

[44] The version regarding the employees' conduct prior to and during the search was only tested with Mr Ngobeni and not Mr Mashabane. In fact the third respondent's case was in essence that the employees ought to have known about the rule because other employees had been disciplined and dismissed for the same offence.

[45] During re-examination of Mr Maake, the third respondent representative sought to introduce the above version but was prohibited from doing so by the commissioner who ruled that such an attempt amounted to introducing new material. The second witness of the third respondent, Mr Ndlovu could not take this issue beyond evidence in chief. He stated that other employees had previously been disciplined for theft. However, he was unable to provide evidence of incidents which related specifically to the rule in question.

[46] Under cross-examination, the security officer who conducted the search testified that an employee who wishes to purchase precious metal was required to produce a letter from his foreman and the engineer authorising such purchase. He further stated that he has samples of such letters but did not have them with him at that point

in time. When offered to go and fetch them, the third respondent's representative intervened and objected to the witness having to fetch the letters. He submitted that the witness did not have copies of such letters and that they were irrelevant.

[47] The commissioner as indicated above based his conclusion on the reaction of both employees when confronted with the search. There is, with due respect, in my view no rational link between this conclusion and the evidence presented before the commissioner.

[48] Mr Ndlovu, the security officer, testified that firstly, Mr Mashabane's van was at the time it was stopped at the gate, driven by a certain Mr Oupa Mathebula. It secondly, appears from his evidence that by the time Mr Mashabane arrived at the gate and presented his pay slip, the offloading of the sieves from his van had already commenced.

[49] It is not clear from the record as to whether or not Mr Mashabane was instructed to assist in the offloading of the sieves and if so by who. In his testimony Mr Maake accused Mr Mashabane of "*pretending to hit me*" during the process of offloading the sieves. This is the only incident that points to a negative behaviour on the

part of Mr Mashabane on the day in question. This allegation was never substantiated. In this regard Mr Maake stated:

> *"He (referring to Mr Mashabane) was no longer putting it right, he was just throwing them down."*

He went further to say:

> *"As I realised that when this guy is pretending to hit me, then I asked Mr Ndlovu to come and help."*

[50] Mr Mashabane denied that the precious metals on his van were concealed by a plastic cover. In this regard Mr Ndlovu could not during cross-examination provide a satisfactory answer as to where the plastic cover was positioned in relation to the sieves and the precious metals. When asked as to whether he took the photos before removing the cover, he said:

> *"I may not remember correctly but what I know is that I only took the photos as an exhibit that which was found – which were stolen."*

[51] The commissioner's inference is nothing but a speculation not supported by objective facts. Put differently, this inference has no base on the facts or evidence before the commissioner. The commissioner failed to look at other possible inferences and in

doing so failed to appreciate the task before him. Consequently his decision lacks rational objective connectivity to the facts before him. In the light of this the arbitration award issued by the commissioner stand to be reviewed.

[52] I see no reason why the costs should not follow the course.

**ORDER**

[53] In the premises I make the following order:

1. The award issued by the Second Respondent is reviewed and set aside.
2. The matter is remitted back to the First Respondent to be heard by a Commissioner other than the Second Respondent.
3. Costs to follow the course.

MOLAHLEHI AJ

**Date of hearing:** **13/12/2006**

**Date of Judgment:** **16/04/2007**

**Appearances:**

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|---|---|
| **For the Applicants:** | **A Goldberg of** |
| | **Nomali Tshabalala Attorneys** |
| **For the respondent:** | **N O Mamabolo of Maserumule Inc.** |