EMPLOYMENT

IN THIS ISSUE

THE FAILURE OF COMMISSIONERS TO EXERCISE THEIR DUTIES, REVIEWABLE IN TERMS OF S145 OF THE LRA?

In the recent decision of *Assmang Limited (Assmang Chrome Dwarsriver Mine) v Commission for Conciliation, Mediation and Arbitration & Others (unreported case number JR2584/2012* dated 14 January 2015), the issue before the court was whether a Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner had committed a gross irregularity by failing to consider the probability and credibility of witness evidence before finding whether an employer's onus was discharged.

Briefly, this case involved a mine worker who had been dismissed for misconduct in that he (i) failed to adhere to safety standards and (ii) left his work site early. Subsequent to the dismissal, the employee referred a dispute to the CCMA. Following the award, the matter was taken on review to the Labour Court. The review succeeded and the matter was referred back to arbitration de novo for reasons relating to a gross irregularity, falling within the ambit of s145(2)(a)(ii) of the Labour Relations Act, 66 of 1995 (LRA).

The court pointed out that an arbitration award is final and binding, and the remedy available to an aggrieved party was a 'review' within the ambit of s145 (2)(a) of the LRA, and more specifically in terms of s145(2)(a)(ii) which reads *"(a) that the commissioner - (ii) committed a gross irregularity in the conduct of the arbitration proceedings."*

The court referred to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC)* and commented that the court must apply the objective test, being *"Is the decision reached by the commissioner one that a reasonable decision maker would not reach?"*.

The CCMA commissioner found that when considering the totality of the evidence, the employer had not proved the fairness of the dismissal, as: *"This was due to the fact that where evidence of both sides is evenly balanced [the employer] cannot be deemed to have succeeded to discharge its onus"*. The court noted that because the commissioner simply found that there was no basis on which to discredit either of the two versions, he found against the employer. This is the point of contention in this matter.

In determining whether the commissioner had committed a gross irregularity in terms of s145(2)(a)(ii) of the LRA, the court referred to *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 138 TPD 551. Goldfields held that a mistake which "…leads to the Court not merely missing or understanding a point of law on the merits, … but to it misconceiving the whole nature of the enquiry, or of its duties in connection therewith…"* and that this amounts to a gross irregularity.

The court further referred to the Supreme Court of Appeal decision in *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae) (2013) 34 ILJ 2795 (SCA)*, with the following emphasis: *"For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result…"*. Emphasis was placed on misconceiving the nature of the enquiry.

The court found that the commissioner missed two pivotal aspects in the present matter. The first was the failure to balance probabilities; the second was his failure to consider the credibility of the witnesses. The judge held that only when these two aspects do not offer any assistance to the trier of fact can it arrive at the conclusion that the party on whom the onus rested failed to discharge the same.

Accordingly, the judge found that it is the duty of the commissioner to weigh up or balance the probabilities. He further pointed out that there is a considerable difference between credibility and probabilities, as in his view, the latter is at the heart of the enquiry in arbitration hearings and must be established as this is decisive of the outcome.

He found that the Commissioner made no attempt to weigh up the conflicting versions of either of the parties, and accordingly the court could not accept this approach. The commissioner should rather have accepted that the two versions were mutually destructive and both could not stand.

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In quoting the Supreme Court of Appeal decision in *Stellenbosch Farmers' Winery Ground Ltd and Another v Martell et Cie 2003 (1) SA 11 (SCA)*, the Labour Court agreed that to resolve this type of conundrum there are three considerations, (a) the credibility of witnesses, (b) their reliability and (c) the probabilities. The judge found that there was no attempt on the part of the commissioner to consider the probabilities or improbabilities of the evidence before him and that the commissioner ignored these three considerations. It was held that the commissioner jumped to that last consideration and dealt with the final step of determining whether the *onus* had been discharged, without considering both the credibility of the witnesses and the probabilities.

The court also found of that the commissioner misconceived the nature of the enquiry and his duties in the proceedings, and such amounted to a gross irregularity as contemplated by s145(2)(a)(ii) of the LRA.

The importance of this matter is that it has fortified the duty of commissioners to consider both the credibility of witnesses and, more importantly, the probability and improbability of the versions of the evidence before them. These considerations must be adhered to before a commissioner can decided if the onus has been discharged or not, and that a failure to do so would amount to a gross irregularity and would be reviewable under the LRA.

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**Fiona Leppan successfully represented Assmang Limited in this matter.

HALTING MINE OPERATIONS - THE NEED FOR HEALTH AND SAFETY INSTRUCTIONS BY THE MINE INSPECTORATE TO BE PROCEDURALLY COMPLIANT

In the recent decision of *International Ferro Metals (SA) (Pty) Ltd v The Minister Of Mineral Resources and Others* (unreported case number JR 1673/13 decided on 15 January 2015), the Labour Court was tasked with deciding whether the chief inspector complied with the peremptory requirements to issue an instruction to the mine.

Briefly, International Ferro Metals (SA) (Pty) Ltd (Ferro) has chrome operations situated in Buffelsfontein and operates a ferrochrome smelter. Ferro is the employer, *quà* owner, in terms of the Mine Health and Safety Act, No 29 of 1996 (MHSA) and bears responsibility for the health and safety of persons at its mining operations.

The inspector issued an instruction in terms of s54(1)(a) of the MHSA that operations at the ferrochrome smelter had to be halted by a specified deadline. The instruction required the employer to withdraw all employees from designated areas which allegedly had high carbon monoxide levels until such time as those were brought below the legal limit. Ferro contended that the instruction should not have been issued because there was no breach of its obligations. Ferro approached the Labour Court to challenge the issuance of the notice and to challenge the validity of the guidelines issued by the inspector which had to be adhered to when an inspector sought to exercise his powers when issuing s54 notices.

In dealing with this issue, the court considered the nature of the s54 instruction. The inspector instructed Ferro to do the following:

- review the carbon monoxide gas procedure and occupation exposure limits;
- withdraw all employees who were working at the sinter screen and bunker tunnel and to retrain them in respect of the revised carbon monoxide procedure by utilising the services of an accredited independent trainer;
- comply with MHSA Regulation 16.4(1) which required Ferro to test its self-contained self-rescuers annually.

Ferro contended that should all the employees be removed from the areas, none of its working areas could operate and this would entail the closure of the furnace building and casting bay as well as a complete shut-down of the ferro-chrome smelter (which operated on a continuous basis).

The inspector contended that for as long as the employees had not been withdrawn from the designated areas, Ferro would remain in breach of the Department of Mineral Resources (DMR's) guidelines.

These guidelines were purportedly issued in terms of s49(6) of the MHSA, which reads:

"The Chief Inspector of Mines must issue Guidelines by notice in the Gazette" (emphasis added).

Ferro argued that because the guidelines had not been gazetted, they should be set aside. It was an accepted fact between the parties that the guidelines had not been gazetted. The inspectorate argued that the guidelines were neither binding nor took away the discretion of inspectors when issuing a s54 instruction.

The court held that because the usage of these guidelines affected the rights and interests of those persons against whom these measures were taken, the guidelines were being enforced

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by the DMR in circumstances where they did not comply with the statutory requirements. The court noted that the wording of s49(6) of the MHSA is peremptory and therefore the guidelines were set aside due to non-compliance with this statutory requirement.

Having regard to this judgment, it is important to note that apart from the issuance of a guideline in terms of s49 of the MHSA, an inspector has powers to deal with what he or she has reason to believe is an occurrence, practice or conditions which do or may endanger the health or safety of any person at a mine. The inspector may give an instruction necessary to protect the health and safety of persons, this power emanates from s54 of the MHSA. The inspector is afforded options which include (but are not limited to) the halting of mine operations, the suspension of any act or practice and instructing the employer to take remedial measures within a specified time frame.

The interpretation of the wording *"reason to believe"* was determined in the case of *Bert's Bricks (Pty) Ltd and Another v The Inspector of Mines, North West Region and 4 Others (15347/2011) [2012] ZAGPPHC 11 (9 February 2012)*, where the High Court found that there were no objective facts which would lead a reasonable person to believe that the damage to the tyre tread (of a single trackless mobile vehicle) would endanger the health and safety of any person at the mine. The High Court found that the instruction to close the entire operation was out of proportion to the risk posed.

The guideline was originally formulated to provide guidance to inspectors on how to objectively assess the dangers posed by employer non-compliance with the MHSA so that as inspector could impose an instruction that is rational and justifiable. One aspect was to examine an employer's history of non-compliance with its obligations under the MHSA which would mean that the historical data would have needed to be available to an inspector prior to issuance of such notices/instructions. The provisions of s49(6) of the MHSA, however, must first be adhered to before any new guidelines are implemented.

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