IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA 17/2007

SAMANCOR MANGANESE (PTY) LTD	Appellant
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
MARAIS, M.E. NO	Second Respondent
NATIONAL UNION OF MINEWORKERS	Third Respondent
GORRAH, E	Fourth Respondent

J U D G M E N T

KHAMPEPE, ADJP:

Introduction

[1] This is an appeal, with the leave of the court, against the judgment of the Labour Court handed down by Mokgoatlheng J. In that judgment the court *a quo* set aside the arbitration award issued by the second respondent (Commissioner). The Commissioner had found that the dismissal of the fourth respondent (Gorrah) by the appellant (the company) for medical incapacity was substantially and procedurally fair.

Parties

[2] The appellant is Samancor Manganese (Pty) Ltd ("*the company*"), a company incorporated in South Africa and an erstwhile employer of Gorrah.

[3] The first respondent is the Commissioner for Conciliation Mediation and Arbitration under whose auspices the third respondent arbitrated the dispute between the company and Gorrah. The third respondent is the National Union of Mine Workers, a trade union of which the fourth respondent was a member. The fourth respondent is Mr E Gorrah. He was an employee of the company and a member of the Trade Union.

Facts

[4] Gorrah was employed by the company as an electrician from 1 July 1999. On the 11th of December 2001, while on duty, he fell off a ladder and injured his back. Pursuant to that injury, he was during the course of 2002, intermittently absent from work.

[5] By January 2003, the severity of the pain was such that it rendered him incapable of performing his duties. Dr Fourie, the company doctor, referred Gorrah to Dr Sheltma, a specialist. Sheltma advised Gorrah to undergo an operation.

[6] On 28 May 2003, Gorrah underwent an operation which was performed by Sheltma. In a report dated 17 September 2003, and following a consultation held with him the previous day, Sheltma advised that:

"*Ek sal voorstel dat die pasiënt nie meer met sy huidige posisie aangaan nie en dat hy vir iets anders aangewend moet word.*"

[7] On 13 October 2003, Fourie, tabled Sheltma's report to the company. In the result, the company's disability management agreement ("DMA") was initiated. The DMA was concluded with the union and constitutes a collective agreement as defined in section 213 of the LRA.

[8] On 14 October 2003, the resident engineer, being Gorrah's supervisor, requested Fourie to "categorise" Gorrah's incapacity as provided for in the DMA.

[9] On 22 October 2003, an inspection *in loco* was conducted and thereafter a "categorisation meeting" in terms of clause 4.1.3 of the DMA was convened. Following that meeting, Gorrah was categorised by Fourie with a category C disability. In terms of clause 4.1.3 of the DMA, category C constitutes a "'partial permanent disability'" which is defined as an employee being "unfit to continue employment in current occupation, but fit to continue employment in an alternative occupation in the company provided that an alternative position is available in the company". It is common cause that Gorrah accepted and agreed with this categorisation. It deserves mentioning that Section 4.1 of the DMA provides for the undermentioned categories of disability

"4.1.1 No disability i.e. fit to continue employment in current occupation (Category A);

4.1.2 Partial temporary disability (for own position) i.e. unfit to continue employment in current occupation after a period of sick leave for recuperation and/or temporary alternative duty (Category B)(AIso refer clause .4.4)

4.1.3 Partial Permanent disability i.e. unfit to continue employment in current occupation , but fit to continue employment in an alternative occupation in the company provided that an alternative position is available in the Company(Category C); OR
Unfit to continue employment in current or any alternative occupation in the company but would still be fit to take up employment outside the company (Category D)"

4.1.4 Total permanent disability i.e permanently incapable of working in own or any other occupation (Category E)

[10] In November 2003, a meeting of the "joint committee" comprising three members of management and three employee representatives was convened. The function[1] of the joint committee is:

"*In respect of category C employees to endeavour to find a suitable alternative occupation inside the company in compliance with the medical tribunal's finding failing which to make recommendations in respect of training and medical assistance as provided for in terms of clause 4.8 of this agreement.*"

[1] Section 3.21 of the DMA.

[11] At this meeting, the positions that were available were those of a miner, a fitter, a laboratory supervisor, and a maintenance supervisor. The joint committee concluded that a meeting should be held with Gorrah to apprise him of the available positions and to invite him to respond in writing thereto.

[12] Gorrah responded to the invitation in a letter to the company in which he indicated that none of these positions were suitable. He in turn proposed that consideration should be given to him for a post of a pitram operator or maintenance planner (although they were not vacant).

[13] On 26 January 2004, the joint committee was reconvened to consider Gorrah's letter and to explore whether any suitable alternative positions were available.

[14] The minutes of this meeting record that:

> "*The joint committee discussed the alternative and suggested positions and Mr Rens informed the committee that the maintenance planner and pitram operator at Wessels (being the positions that Gorrah had proposed) are not vacant positions …The chairperson asked all the members of the committee to express their views, but all the members agreed that no suitable position is available.*"

[15] Gorrah accepted in his evidence that the decision of the joint committee regarding the unavailability of suitable positions was fair in that the available posts at the time were not suitable for his health condition.[2]

[2] See the record (5) p 344 lines 9-11.

[16] In the result, the termination process commenced. Clause 4.6.4 of the DMA provides that if a suitable alternative position cannot be found for a category C employee, "the employee's services shall be terminated and he shall be paid the medical disability benefits provided for in clause 5.2".

[17] On 3 March 2004 Gorrah was given written notice of the company's intention to terminate his employment on account of his medical disability as from 31 March 2004.

[18] The reason advanced by the company for Gorrah's dismissal was enunciated as follows:

> "*LETTER OF TERMINATION OF SERVICE DUE TO MEDICAL DISABILITY*
>
> *This serves to inform you that your service with the company will be terminated in terms of the Medical Disability Agreement.*
>
> *All possibilities were exhausted to find an alternative vacancy for you with the company but with no success.*
>
> *The terms and conditions are as follows:*
>
> 1. *Your service will be terminated on 31 March 2004*
> 2. *You will receive medical disability benefits as set out in the Disability Management Agreement, which is equal to 3 weeks salary for every year of service.*
> 3. *Accumulated leave will be paid to you.*
> 4. *Your Pension Fund Benefits will be paid directly to into your banking account by Momentum as soon as your claim has been finalised.*
> 5. *Amounts owing to the company will be recovered from money due to you.*
> 6. *Membership to the Medical Aid Fund will cease on 31 March 2004 however, you will be entitled to medical assistance by the company in terms of the Disability Management Agreement.*
> 7. *You are also informed that subject to the conditions of the DMA, you qualify for one course for a maximum of four (4) months as per the attached Department of Labour courses list and the company will pay the training costs only.*

8. *You are required to go for exit medical examination prior to the termination date at Afroch Clinic.*

9. *Should you need any further information please do not hesitate to contact the relevant Human Resources Official and your trade union representative.*

10. *Management would like to thank you for your service to the company and wish you all the best in future.*

Yours Faithfully

HP Botes

General Manager"

Arbitration

[19] Gorrah challenged his dismissal at the CCMA alleging that it was both procedurally and substantively unfair. In essence the challenge related to whether suitable alternative positions were available at the time of his dismissal and whether Gorrah's dismissal was procedurally fair.

[20] At the arbitration, Gorrah was represented by the union's official and the company was represented by its Employee Relations Superintendent. In terms of the pre-arbitration conference minute, handed in by agreement at the commencement of the arbitration, facts which were common cause and those in dispute were stipulated as follows:

20.1 Facts which are common cause:

20.1.1 Mr Gorrah was an employee of HMM.

20.1.2 His services were terminated on the 31st of Mach 2004 for incapacity (ill-health).

20.1.3 The DMA (Disability Management Agreement) procedure was followed.

20.1.4 The bundle of documents are what they purport to be.

20.2 The issues in dispute were stipulated as follows:

20.2.1 Availability of suitable alternative position.

20.2.2 Inconsistency.

[21] The union official raised two further issues for inclusion in the list of issues in dispute. The issues were formulated by the Commissioner as follows "Mr Mayoyo indicated another issue in dispute should be added. He said that it would be the union's case that, although Disability Management Agreement was followed, the process followed was not in terms of the Labour Relations Act 66 of 1995. Mr Radebe did not object to this issue being added. It therefore has to be decided whether the dismissal of the applicant was substantively fair or not, with specific reference to the availability of a suitable alternative position and consistency (own emphasis).

[22] It furthermore had to be decided whether the dismissal of the applicant was procedurally fair in terms of the Labour Relations Act 66 of 1995 as amended. The other issue related to the company's failure to re-categorize the positions.

[23] At the arbitration, Ms Noleen Klaaste an H.R. coordinator at Wessels underground mine gave evidence on behalf of the company with regard to the events which led to Gorrah's dismissal in terms of the DMA.

[24] Her evidence was replete with details relating to the company's compliance with the categorization process followed in respect of Gorrah as provided for in the DMA. She also testified about the events which preceded Gorrah's categorisation, the terms of the DMA, the process which was followed to categorise Gorrah and the composition and functions of the joint committee. Importantly she explained that at the first seating of the joint committee the chairperson had requested Nic Rens, who is responsible for updating the company's organogram to advise the joint committee of the positions that were available at that stage. Such positions were then conveyed to Gorrah. The ambit of her evidence in this regard was in any case largely common cause. She further testified that the company handled incapacity cases consistently. This evidence was not challenged by the respondents.

[25] Gorrah gave evidence in support of his case and also called Mr Bosiame[3] who was a member of the joint committee and also served as Gorrah's representative to give evidence in support of his case. Gorrah testified with regard to the events that led to his categorisation. The notable feature of his evidence was that he accepted the correctness of his categorisation by Fourie with category C disability. Furthermore, he confirmed that he did not dispute his categorisation as envisaged in terms of the DMA.

[3] He was the chairperson of the shop steward's committee.

The pertinent evidence appears from the following questions which were put to him:

> "*MR RADEBE: Have you ever at any time with the help of your union representative disputed the categorisation process?*
>
> *MNR GORRAH: Ek het nie deur die unie nie want omdat daar aanduidings was die – MNR KOLYANE, die wat onse voltydse unie man het probleme ondervind om vergaderings te belê waar ons die dinge kon bespreek maar ek het na DR MARCUS FOURIE toe gegaan en aan hom duidelik gemaak waarin hy vir my gesê het dit is nie moontlik nie.*
>
> *MADAM COMMISSIONER: Net 'n oomblik. Laat ek nou gou hoor. Het u 'n probleem met die kategorisasie, kyk soos ek die kategorisasie C verstaan sê hy – laat ek net seker maak voordat ek iets verkeerd sê. Category C employees …*
>
> *MR RADEBE: Under B1/4…*
>
> *MADAM COMMISSIONER: B1/4. partial permanent disability, that is unfit to continue employment in current occupation but fit to continue employment in an alternative occupation in the company provided that an alternative position is available in the company. Or unfit to continue employment in current or any alternative occupation in the company but would still be fit – nee, dit is D.*
>
> *MNR GORRAH: Dit is D daardie.*
>
> *MADAM COMMISSIONER: C is ongeskik om voort te gaan met diens in jou huidige occupation – posisie maar geskik om met diens – employment voort te gaan in 'n alternatiewe posisie in die maatskappy op voorwaarde dat hierdie alternatiewe posisie beskikbaar is. Sou u sê dit is reg of verkeerd? Ek meen op grond waarvan sê u dit nie reg nie, kom ons vra so.*
>
> *MNR GORRAH: Kom ek sê DR MARCUS FOURIE het aan my die spesifieke kategoriseering verduidelik die dag en omdat hy dit duidelik gemaak het dat daarna alternatief gekyk sou word vir 'n ander werk by die maatskappy het ek die kategoriseering op daardie stadium aanvaar.*"

[26] Bosiame, who was Gorrah's representative and constituted the joint committee convened in terms of the DMA, also gave evidence in support of the respondents. He confirmed that after Gorrah's categorisation, the joint committee of which he was a member, had at its first meeting considered

alternative vacancies that the company presented to that structure, but came to the conclusion that these were not suitable for Gorrah.[4]

[27] At subsequent meetings the union component of the joint committee had pressed that a more suitable position such as that of a switchboard operator be made available to Gorrah. He however conceded that the relevant position was at that stage occupied and the company had indicated at the time, that the position was not a vacancy.[5]

[28] He testified that they later advised Gorrah to table a letter to Fourie for re-categorisation.[6] It is evident that that letter was written by Gorrah sometime in May 2004 after the company had acted in terms of clause 6.4 of the DMA.

[29] The evidence having been concluded and written arguments having been presented, the arbitrator came to the following conclusion in her award:

> "*The applican'st services were terminated as a result of medical incapacity. It was common cause that his specialist, Schltema, recommended that he should not continue with his current occupation, but might be fit for alternative work*."
>
> ''…*A collective agreement, the DMA, determined the process to be followed with regard to medical incapacity… The applicant's union, the NUM, is party to the DMA. It was confirmed to be common cause that the DMA was followed.* ..''

[30] With regard to the issue of inconsistency, she accepted Klaaste's evidence that the company handled incapacity cases consistently and accordingly found that there was no basis for a finding of inconsistency.

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4 Record (5) 365 lines 19-30.
5 Record (5) 366 lines 2-30.
6 Record (5) 370 lines 18-30.

[31] She further found that the DMA was not contradictory to the purpose of the Labour Relations Act. She found that as it was common cause that the process followed by the respondent was in terms of the DMA it followed that the process was also in terms of the Labour Relations Act.

[32] In so far as it relates to the issue of whether any suitable positions were available prior to the dismissal for medical incapacity she found as follows:

> "*It appeared to be common cause that the available posts as indicated on Exhibit B1/2 were not suitable. At the joint committee meeting in January the other two posts suggested by the applicant were discussed. Apparently the applicant had considered the suitability of all position at the mine, whether available or not. The suggested posts were not available. Vacant posts are advertised. No other vacant posts were brought up for discussion at the second joint committee meeting. According to Mr. Bosiame's evidence the company at this meeting indicated that no other posts were available*…
>
> *…Apparently only the switchboard position would be suitable. It was not a vacant position and was the only other position that the union proposed that the company should attempt to make available.*
>
> *The joint committee's task, and the task of all its members, is to "endeavour" to find a suitable position. I am satisfied that this was done in this matter.*
>
> *The applicant as well as Mr. Bosiame confirmed that the available positions indicated to the applicant were not suitable. Both the applicant and Mr. Bosiame said that the only suitable position would be the position of the switchboard operator. That position was not vacant and I accept the evidence that it would not be feasible to make it available by shifting the permanent employee…*[7]

[7] The portions of the award are quoted insequentially.

Labour Court

[33] The third respondent and Gorrah were aggrieved by the outcome of the award. The award was therefore taken on review to the Labour Court in terms of Section 145 of the Labour Relations Act.

[34] I now turn to deal with the grounds of review relied upon by the respondents before the Labour Court. At the outset it would be apposite to note that a myriad of grounds were relied upon on review which did not constitute the issues that were considered by the Commissioner. I only advert to those that the *court a qou* ostensibly relied upon to overturn the award. These included that:

Grounds for Review:

34.1 ‘’She erroneously found that the dismissal of the second appellant was substantively and procedurally fair. She should have found that the second applicant was substantively and procedurally unfair.

34.2 The applicant states that the dismissal was unfair in that:

34.2.1 the third Respondent improperly applied the principles of the Disability Management Agreement and used it as a form of retrenchment contrary to clause 1 of the Disability Management Agreement;

34.2.2 all the medical practitioners to whom the Second Applicant was referred to for medical examination

were chosen by Fourie of the third Respondent. None of the doctors who examine the Second Applicant were appointed by the first Applicant in terms if clause 2.1 of the Disability Management Agreement;

34.2.3 she failed to realize that the third Respondent did not comply with the Disability Management Agreement provisions;

34.2.4 she failed to realize that the Third Respondent failed to offer the second Applicant a suitable alternative position and that it instead deliberately offered him unsuitable post…"

Findings by the court *a quo*

[35] The court *a quo* made the following principal findings.[8] It found that:

35.1 Dr Fourie was obliged to refer Gorrah's request for re-categorization to the medical tribunal *de novo* inorder to determine Gorrah's medical category and his failure to do so constituted a breach of clause 4.2 of DMA rendering Gorrah's dismissal unfair, and the award of the commissioner reviewable.

35.2 It was impermissible for Gorrah's representative (Bosiame) to act in a dual capacity (i.e. as a member of the joint committee and as Gorrah's representative) and, accordingly Gorrah was

[8] Record 8 p 537-540 paras 64-75.

effectively not represented at the joint committee meetings, with the result that Gorrah's dismissal was unfair, and the commissioner's award reviewable. In this regard the Court reasoned that:

> Bosiame was a member of the "*joint committee*" yet he also purported to be the second applicant's representative at the joint committee meeting.
> In my view the "DMA" renders it impermissible for the second applicant's representative to simultaneously sit as a member of the joint committee and also act as a representative of a party whose case is been discussed. However, laudable Bosiame's efforts may have been in purporting to represent the interests of second applicant, the joint committee is an autonomous body comprising of its constituent members. Any person purporting to represent the second applicant cannot contemporaneously sit as a member of the joint committee as Bosiame purported to do.

35.3 The aforesaid *"flawed procedure"* rendered Gorrah's dismissal procedurally and substantively unfair.

35.4 In regard to the issue of relief, the court *a quo* set aside the commissioner's award on review, with costs and ordered Gorrah's retrospective reinstatement from 18 May 2004;

Submissions on appeal

[36] Before us Mr Myburgh, who appeared on behalf of the appellant, has submitted that the court *a quo* misdirected itself with regard to its findings on the merits. He argued that the court *a quo's* finding that Gorrah should have been re-categorised was incorrect because it was based on the incorrect date of Gorrah's dismissal. Mr Goldberg, who appeared on behalf of the third and

fourth respondents, albeit conceding that the date relied upon by the court *a quo* is incorrect, nevertheless argued that on the consideration of the evidence its findings could not be faulted.

[37] It seems to me that the court *a quo's* finding relating to the appellant's failure to re-categorise Gorrah, was based on the union's contention that Fourie should have re-categorised Gorrah when he received his letter dated 14 May 2004 requesting Fourie to recategorise him as a category E disability.

[38] In my view, the court *a qou*, lost sight of the fact that Gorrah was dismissed for medical incapacity on 31 March 2004, with the letter in question being addressed to Fourie on 14 May 2004, approximately 1 ½ months after Gorrah's dismissal.

[39] Although the union pleaded in its founding affidavit that that Gorrah was dismissed on 18 May 2004(i.e. after his letter to Dr Fourie of 14 May 2004), the company answered that the dismissal occurred on 31 March 2004, which was not denied in reply. Furthermore Gorrah's letter of termination[9] clearly reflects his date of dismissal as being 31 March 2004, with this being the date of dismissal recorded in the pre-arbitration minute and placed on record at the commencement of the arbitration, and correctly recorded in the arbitration award.

[40] Any failure on the part of the company to re-categorize Gorrah's incapacity after dismissal could not have had any bearing on the fairness of Gorrah's dismissal on 31 March 2004, it being the act of dismissal on that day that was subject of the proceedings before the commissioner.

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[9] See page 6 above para 18.

[41] The court *a quo's* finding that Fourie should have still entertained the categorisation of a dismissed employee is plainly erroneous.

[42] Given the above, the appellant's submission that any failure on the part of the appellant to re-categorise Gorrah's incapacity after his dismissal has no causal connection to the fairness of Gorrah's dismissal on 31 March 2004 is in my view correct. It is trite law that an employee's conduct that did not constitute the subject of his dismissal has no relevance when determining whether his/her dismissal was substantially fair or not.[10] In the circumstances of this case there was no casual connection between the fairness or otherwise of Gorrah's dismissal on the 31 March 2004 and the failure to re-categorize his capacity on 14 May 2004.

[43] It is evident that the Commissioner had not jurisdiction to enquire into the issue in question, and, accordingly, did not commit a reviewable irregularity (as found by the court *a quo*) in failing to do so.

[44] It would seem to me that the finding of the court *a quo* appears to have been motivated by its erroneous acceptance that Gorrah was dismissed on 18 May 2004 (i.e. after the request of re-categorization). As stated above, this is incorrect. There can be little doubt that the court *a quo* would not have made this finding had it correctly recognised that Gorrah was in fact dismissed on 31 March 2004, well before the request for re-categorization was made.

[45] Mr Goldberg has however strenuously argued that "*this error in no way influenced the Judge. It is submitted that there is no basis to the submission*

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[10] *Flex-o-thene Plastics (Pty) Ltd v CWIU* [1999] 2 BLLR 99 (LAC); *Mndaweni v JD Group t/a Bradlows & another* (1998) 19 ILJ 1628 (LC) at 1631A-C; *Mondi Paper Co Ltd v PPWAWU & another* (1994) 15 ILJ 778 (LAC).

that the finding in question is based on an erroneous belief that Gorrah was dismissed on 18 May 2004. The Judge a quo rather based his decision on his recounting of the evidence, which was that 'Second Applicant after his re-categorisation approached Doctor Fourie to re-categorise his physical disability as category E, that is permanently incapable of working in his own or any other occupation. Doctor Fourie refused. Critically Doctor Fourie failed to appreciate or to understand that Gorrah was disputing his finding that his physical disability was a partially permanent disability". The court *a quo's* reasoning and concomitant finding that when Gorrah approached Fourie in terms of the letter dated 14 May 2004 -1½ months after his purported dismissal - for a re-categorisation of his physical disability from category C to E, Fourie "*critically failed to appreciate that Gorrah was disputing that his physical disability was not a partially permanent disability*" is in my view erroneous.

[46] In my view the court *a quo's* finding in this regard fails to take proper account, first, of the evidence which was largely common cause before the Commissioner and second, demonstrates the court *a quo's* failure to properly construe the provisions of the DMA. I hereunder deal further with this aspect.

46.1 The thrust of Gorrah's evidence was that he accepted that his categorisation by Fourie as a category C disability in terms of the DMA was correct..[11]

[11] See pages 10 *supra* dealing with Gorrah's *viva voce* evidence.

46.2 Section 4.2 of the DMA provides a procedure for disputing any categorisation made in terms of section 4. This sub section provides as follows:

> "*4.2 In the event of the employee disputing the findings of a Company Medical Officer, he shall have the right to have his case referred to the Medical Tribunal subject to him advising the Human Resources Manager in writing of his intent to do so, within 30 days after being categorised by a Company Medical Officer. If for any reason beyond the employee's control he could not give such notice, due cognisance will be taken thereof."*

[47] In this regard the court found that there was an obligation on Fourie to refer Gorrah to the Medical Tribunal *de novo* to determine Gorrah's medical category. It therefore found that his failure to have acted in that regard was a contravention of clause 4.2 of the DMA.

[48] The procedure for invoking section 4(2) of the DMA is manifestly clear. It behoves the employee to advice not the company medical doctor, Fourie, but the Human Resources Manager in writing of his intent to do so within 30 days after being categorised by a company medical doctor.

[49] Accepting that Gorrah intended to dispute his categorisation from category C to E. No explanation has been advanced by him why the requisite notice was not given to the Human Resources Manager within the stipulated time of 30 days as the DMA provides. Furthermore no reasons have been

cited why in Gorrah's view Fourie would have been competent to receive the notice of the dispute and not the Human Resources Manager as envisaged by the DMA. In any event, the first respondent and Gorrah's conduct after the latter's categorisation, negate any inference that they were unhappy with the categorisation.[12]

[50] I am satisfied that there was no shred of evidence that Gorrah or the union intended to disputed the relevant categorisation in terms of Section 4(2) of the DMA.

[51] Section 4.2 of the DMA does not impose any obligation on the joint committee to consider re-categorisation of an employee particularly in circumstances where his initial categorisation was unchallenged. The court *a quo* therefore erred when finding that Fourie was obliged to refer Gorrah to the Medical Tribunal for re-categorisation.

[52] The Court *a quo* further found that as Bosiame was a member of the Joint committee, the provisions of DMA rendered it impermissible for him to simultaneously act as Gorrah's representative. The court found that:

> *"However, laudable Bosiame's efforts may have been in purporting to represent the interest of Second applicant, the joint committee is an autonomous body comprising of its consistent members. Any person purporting to represent the Second Applicant cannot contemporaneously sit as a member of the joint committee as Bosiame purported to do"*

[12] See page 9 *supra*.

[53] The finding by the court *a quo* regarding the dual role played by Gorrah's representative is in my view erroneous for the following reasons:

53.1 The issue in question is not amongst the union's pleaded grounds of review, and it was therefore not an issue before the commissioner, with the result that she cannot be found to have committed a reviewable irregularity in failing to make the finding in question.[13] (Indeed, it was common cause at the arbitration that the provisions of the DMA had been complied with).[14]

On the authority of this court in *Rustenburg Platinum Mines Ltd v CCMA* & *Others,*[15] it was impermissible for the court *a quo* to have come to Gorrah's relief on this basis.[16]

53.2 I agree with the submission made by Mr Myburgh that, the finding that Gorrah's dismissal was procedurally unfair because his representative was also a member of the joint committee is irrational. It is indubitable that if anything, this served to increase Gorrah's influence and enhanced the procedural fairness of his dismissal. This is clearly demonstrated by the evidence of Bosiame himself. His uncontroveted version was that at the

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13 *Van Wyk v Independent Newspapers Gauteng (Pty) Ltd & others* (2005) 26 ILJ 2433 (LC) at para [17]; *PG Group (Pty) Ltd v Mbambo NO & others* (2004) 25 ILJ 2366 (LC) at para [33]. Indeed, if the Commissioner had made the finding in question, in circumstances where the issue in question had not been identified as being an issue in dispute at the arbitration, she would have committed a reviewable defect. This occurred in: *AA Ball (Pty) Ltd v Kolisi & another* [1998] 6 BLLR 560 (LC) at 562F-G; *Telkom SA Ltd v CCMA & others*[2003] 1 BLLR 92 (LC) at para [7]; *Oracle Corporation SA (Pty) Ltd v CCMA & others* [2005] 10 BLLR 982 (LC) at para [16].

14 Record 4 p 252 lines 9-14; Record 3 p 239 paras 1-3.

15 [2004] (1) BLLR 34 (LAC) at para 15.

16 See similarly: *De Beers Consolidated Mines Ltd v CCMA and others* [2000] 9 BLLR 995 (LAC) at para [15]; *Mzeku & others v Volkswagen SA (Pty) Ltd & others* [2001] 8 BLLR (LAC) at para [32].

various sittings of the joint committee he consistently pressed for the consideration of a number of suitable positions for Gorrah.

[54] Furthermore, the court *a quo* plainly misconstrued the provisions of the DMA. It is a well established principle in the construction of agreements and statutes that where words are defined in the agreement, any provision in the agreement relating to the defined words should be constructed so as to give expression to their defined meaning unless to do so would lead to a n absurdity so glaring that the parties to the agreement could not have contemplated.[17]

[55] In terms of the DMA[18], both the constitution of the Joint committee and its functions are clearly defined and set out. There is nothing in the definition of the Joint committee or in the functions of that Committee as envisaged in terms of the DMA that seeks to limit or expand the palpably well defined functions of the joint committee. Ineluctably, there is no room to suggest the provisions of the DMA preclude Bosiame from constituting the Joint committee if he acts as Gorrah's representative. Moreover, there is no dislocation or inconsistency between the functions of the Joint committee and the assistance that was sought to be rendered by Bosiame to Gorrah. Given the above, it was impermissible for the court to seek to find a limitation to the defined functions of the Joint committee and/or add words of exclusion or extension to its members inconsistent with what the defined words are

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[17] See *Venter v R* 1907 TS 910 @ 915
Also EA Kellaway in Principles of Legal Interpretation Statutes, Contract And Wills at page 269, 272

[18] Section 2.2 defines the composition of the Joint Committee and Section 3 defines the functions of the Joit Committee. Section 4.1 sets out the various Medical Categories for disability.

intended to cover by the DMA. In the result, its finding that the DMA precluded the contemporaneous roles played by Bosiame has no textual support and constitutes misdirection.

[56] The court also found that when Gorrah disputed Dr Fourie's categorization he did not have the assistance of a representative in terms of the DMA. In this regard it was submitted by Mr Goldberg, on behalf of the third and fourth respondents, that this finding was unassailable because Bosiame's dual role deprived Gorrah of the advice pertaining to available options subsequent to his categorisation.

[57] The provisions of the DMA which determines the procedure for the categorization and conveyance of the relevant categorisation are quite clear.

A company medical Doctor is enjoined to categorize the employee's medical condition in terms of the various categories stipulated in the DMA. In determining the relevant category, the Company Medical Doctor only considers all relevant medical information including medical reports received from other medical practitioners.

[58] Once the categorization of an employee has been determined, such findings are conveyed to the Manager as well as the relevant employee, by the Company Medical Doctor, in the presence of the employee's representative. It is the employee's Manager who at that stage must explain to the employee the full consequences of the findings and the available options (to either accept or reject the findings) and not the employees' Representative.

[59] Having regard to the above, the Court *a quo's* finding that when Gorrah disputed the finding he did not have the assistance of the DMA is not born out by the provisions of the DMA.

[60] Section 4.6 of the DMA authorizes the company to dismiss a category C employee, if he has been offered an alternative occupation but has not occupied it because he is unable to carry out the duties required by that occupation and another alternative occupation is not available within 4 months of him declining an offer of an alternative occupation.

[61] Having regard to the aforesaid provisions, the cardinal question to consider in the context of Gorrah's dismissal is whether there were positions available within the 4 months of Gorrah's refusal of the alternative occupations. The evidence clearly points that there was no such availability.

[62] In my view the Commissioner's findings that the Joint committee had performed its functions of ''endeavouring'' to find a suitable position for Gorrah and that on the evidence presented no positions were available was correct and should not have been set aside.

[63] The only issue remaining relates to the court *a quo's* finding that ''the flawed procedure'' rendered Gorrah's dismissal procedurally and substantively unfair. In *Unitrans Zululan(PTY)LTD v Cebekhulu*[19], this Court held that procedural unfairness (no matter how serious) cannot, as a matter of law, translate into a finding of substantive fairness, the two do not and cannot overlap. The court *a quo's* finding in this regard was an error.

[19] [2003] 7 BLLR 688 (LAC) para 24.

[64] I am mindful that the test enunciated by the Constitutional Court[20] in order to determine whether the award should be reviewed or not is whether a reasonable decision maker could not have reached the same reasoning. In the end, I am satisfied that the decision of the Commissioner is not the sort that a reasonable decision maker could not have reached.

[65] The requirements of the law and fairness dictate that the respondents should not be ordered to pay the costs of this appeal.

Order

In the premises I make the following:

1 The appeal is upheld.

2 The order of the *court a quo* is set aside and is substituted with the following order:

''The review application is dismissed with costs.''

_____

KHAMPEPE ADJP

I agree:

_____

[20] *Sidumo & another v Rustenburg Platinum Mines & others* Case No. CCT 85/06 delivered on 5 October 2007.

Leeuw JA

I agree:

_____

TLALETSI AJA

For the appellant	:	Adv A T Myburgh
Instructed by	:	Leppan Beech Inc
For the respondent	:	Adv Goldberg
Instructed by	:	Nomali Tshabalala Attorneys

Date of Judgment	:	18 May 2009

AUTHORITIES

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