REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

CASE NO: JR3323/10

In the matter between:

HARMONY GOLD MINING COMPANY LTD **Applicant**

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER NTOMBELA N.O. **Second Respondent**

NATIONAL UNION OF MINEWORKERS **Third Respondent**

STHEMBELE DYANTYI **Fourth Respondent**

Heard: **3 March 2014**

Delivered: **5 September 2014**

Summary:

JUDGMENT

RAWAT, AJ:-

A. Background

[1] This matter arises out of the following facts:

1.1 The Fourth Respondent, Sthembele Dyantyi (Dyantyi) commenced employment with the Applicant, Harmony Gold Mining Company (Hamony), on 2 December 1993. By November 2009, Dyantyi was employed as Harmony's Liaison Officer earning R10 079.00 per month. , The Fourth Respondent co-ordinated accommodation for the Applicant's employees who were participating in the Annual Comrade Marathon held in Durban on 24 May 2009. These employees were accommodated at Southern Sun Hotel. Harmony paid the hotel R85 165.75 for both accommodation and meals in advance. At the end of the event, the hotel established that R2 518.00 was to be paid back to Harmony. The hotel receptionist, Ms. Nosipho Mbambo (Nosipo) telephonically called Dyantyi,

as the co-coordinator of the event, and requested the account details to which the outstanding amount of R2 518.00 was to be paid. Southern Sun Hotel did not have Harmony's banking details to which Southern Sun Hotel could pay the R2 518.00 refund. Dyantyi provided his banking details to Mbambo by sending her a formal email which read "Hi Nosipho, this is the account you were looking for – S.J. Dyantyi (details of the bank account appears here)".

[2] The reason the money was not paid into Dyantyi's account was because of a Ms. Lall from Southern Sun Hotel who realised this was a personal employee account and herself established Harmony's banking details into which the money was paid into on the 12 July 2009.

[3] Dyantyi telephoned Nosipho on 1 July 2009, some month and four days later, to enquire if the money had been paid into his account.

[4] During all this time, from 26 May 2009 until 1 July 2009 Dyantyi did not inform any of his superiors of his having provided his personal banking details to Southern Sun Hotel for the purpose of receiving a refund of money owed to Harmony. This much is common cause.

[5] The Applicant, Harmony Gold Mining Company Limited (Harmony), charged the Fourth Respondent (Dyantyi) with dishonesty in that Dyantyi dishonestly had attempted to commit an act of theft of company funds to the total amount of R2518.00 during May 2009. The result of which was that Dyantyi was found guilty and dismissed. An appeal hearing was held on 5 November 2009 which upheld the decision of the Chairperson of the disciplinary hearing.

[6] Dyantyi then referred a dismissal dispute to the First Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) which proceeded to arbitration before the Second Respondent (the Commissioner). In his pursuant arbitration award dated 28 October 2010 under case number GAJB 384760-09 (the award), the Commissioner held that the dismissal was substantively fair but

procedurally unfair and awarded Dyantyi compensation equivalent to six (6) months' salary.

[7] The present application is for review and setting aside of the part of the award in terms of which the Commissioner held that Dyantyi's dismissal was procedurally unfair and ordered Harmony to pay Dyantyi compensation equal to six months' salary ("main review").

[8] Dyantyi and his trade union, the Third Respondent, the National Union of Mineworkers (NUM), also launched an application under the above case number for review and setting aside of the Commissioner's findings on substantive fairness (cross-review).

[9] Mr. Dyantyi also made an application for condonation for the late filing of the cross review application to which the Dyantyi and NUM seek a partial review to substitute the arbitration award of the Commissioner under case number GAJB 38476-09 handed down on 28 October 2010, in so far as the Commissioner found the Dyantyi's dismissal to have been substantively fair. Dyantyi and NUM did not seek to review the procedural fairness of the award.

[10] Mr. Dyantyi and NUM should have filed their review application on or before 15 December 2010. In fact, the cross-review application was filed on 24 August 2011, some thirty (30) weeks later.

[11] At the hearing on 3 March 2014, it was decided to hear the cross-review first.

B. Condonation and the cross review

[12] In order to succeed with its condonation application, Dyanti and the NUM must show good cause for their failure to deliver their cross review within the prescribed time limit set out in the LRA[1].

[1] Section 145 of the Labour Relations Act. 66 of 1995.

[13] In considering whether good cause has been shown in an application of this kind, the courts have identified the following factors as key to deciding whether condonation is appropriate in a particular instance[2]:

13.1 The extent or degree of lateness;

13.2 The explanation for the delay;

13.3 The prospects of success of the party seeking condonation; and

13.4 The importance of the case.

[14] The courts have further indicated that these factors are interrelated, they are not individually decisive. However, without a reasonable and acceptable explanation of the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[15] This Honourable Court has further held that inordinate delays in prosecuting a review to finality and protract the dispute, damage the interests of justice and prolong the uncertainty of those affected by the delay.

[16] Furthermore, this Honourable Court has held that there are two principal reasons why the Court should have the power to dismiss a claim at the instance of an aggrieved party who had been guilty of unreasonable delay. The first is that the unreasonable delay may cause prejudice to other parties, and the second is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions.

1. THE DEGREE OF LATENESS

[17] In terms of section 145 of the LRA, an application for review has to be launched within six weeks of the date of publication of the award to the parties. On Dyanti

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[2] Melane v Santam Insurance Company Ltd 1962 (4) SA 531 (AD)

and the NUM's own version the cross review ought to have been filed on or about 15 December 2010, since they had received the award on 3 November 2010.

[18] The cross review was launched on 24 August 2011. Such application was therefore eight months and six days late from the prescribed six weeks in the LRA.

[19] It was submitted that the delay in this matter was excessive and unacceptable, more so because Dyanti and the NUM were represented by a firm of attorneys in the main review as well as the cross review and as such, the legal representatives ought to have been aware of the necessity to bring a cross review application within the prescribed six weeks.

[20] This Honourable Court has held that it has an inherent power to dismiss an application for review where there has been an unreasonable delay in prosecuting the matter. Further, that the relevant enquiry in deciding whether the matter should be dismissed is two-fold[3]:

(a) Has there been a delay in the prosecution of the application that is "*unreasonable*"; and

(b) If so, should that unreasonable delay be condoned.

[21] In considering (b), the Court exercises a discretion with regard to all the relevant circumstances and in particular, those generally considered in relation to applications for condonation[4].

[22] Further this Honourable Court has also held that where there has been undue delay in seeking relief, the Court will not grant it when in its opinion it would be inadequate to do so after the lapse of time constituting the delay. Furthermore, that in forming an opinion as to the justice of granting the relief in the face of a

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[3] Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council & others {2006) 27 ILJ 2574 (LC); Bezuidenhout v Johnson NO & others (2006) 27 ILJ 2337 (LC)

[4] Zondi & others v The President of the Industrial Court & another [1997) 8 BLLR 984 (LAC) at 988 1-989 F

delay, the Court can rest its refusal upon the potential prejudice, and that prejudice need not be to the Defendant in the action but to third parties[5].

[23] It was submitted that the delay was clearly unreasonable and that on this ground alone the Applicants' application for condonation ought to be dismissed.

2. THE APPLICANTS' EXPLANATION OF THE DELAY

[24] The Courts have held that, for a condonation to be granted in the case of a dispute over an individual dismissal, the excuse for non-compliance with the prescribed time period must be compelling[6].

[25] It is trite that the explanation tendered by the Applicant for condonation must be sufficiently full to enable the Court to determine what caused the delay as well as what steps an Applicant took during the period of lateness in order to move the matter forward[7].

[26] Dyanti's explanation of the delay amounts to no more than an attempt to assign all the blame to the NUM's official representatives and he contends that these officials' negligence ought not to be attributed to him.

[27] The delays between 8 November 2010 and 8 February 2011 make up three months where the Dyantyi and NUM made no constructive effort to launch their cross review considering that as at 17 November 2011, Dyanti was dissatisfied with the outcome of the award (in that an order of reinstatement was not made).

[28] Further, on the Dyantyi's own version, he was advised as at 17 February 2011 that the matter had been referred to their attorneys of record. With the knowledge that Dyanti was not happy with the award, the attorneys of record were at least supposed to immediately launch the cross review and a condonation application at that time and await the transcription of the record to supplement their founding affidavit to the cross review.

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5 Sishuba v National Commissioner of SAPS [2007] 1 0 BLLR 988 (LC)

6 Queenstown Fuel Distributers CC v Lubuschagne NO & others [2000] 1 BLLR 45 (LAC) at paragraph 24

7 Pekeur v Safety & Security Sectoral Bargaining Council & others [2008] JOL 21834 (LC) at paragraph 12

[29] It was not incumbent on Harmony to dispatch the transcript of the electronic record to the Dyantyi and NUM in order for them to be able to file their cross review. Therefore there is no basis in the allegation that they were awaiting to receive the transcript from Harmony's attorneys of record.

[30] Further, in any event, as at 13 April 2011, Harmony complied with its obligations in the main review in terms of Rule 7 A(6) and (8) of this Honourable Court's rules. Harmony's attorneys of record dispatched the record to the Dyantyi and NUM's attorneys by registered mail and obtained proof of service in this regard. As such, the Dyantyi and NUM should have launched their cross review at this point. However, Dyantyi and NUM wasted time and delayed for almost a further four months.

[31] The further delay between April and August 2011, was unnecessary in that Dyantyi and NUM instead of wasting time investigating the service of the record, could have just uplifted the court file and made copies of the record. Alternatively, they could have requested Harmony's attorneys for an additional copy and tendered the costs for the copies.

[32] It is uncertain how there could have been a miscommunication between Dyantyi and the NUM's attorneys regarding the fact that Dyantyi intended and/or instructed NUM and their attorneys to review the award. As at 17 November 2011, Dyantyi notified NUM that he was not happy with the outcome of the award and that he wanted to challenge it. In this regard, the allegation is that it was only in August when the answering affidavit to the main review application was being prepared that Dyantyi instructed the Applicants' attorneys to launch a cross review application.

3. APPLICANTS' PROSPECTS OF SUCCESS

[33] The Applicants prospects of success in this case are minimal. Dyanti's dismissal was manifestly fair. The evidence given by Dyanti that Ms Nosipho Mlambo ("**Nosipho**") had requested him to urgently provide his bank details so that the

refund due to Harmony could be paid, was contradicted by Nosipho's evidence[8] which is silent about her having placed pressure on Dyanti to urgently furnish her with a bank account number.

[34] Further, the Commissioner accepted the existence of the rule underlying the charge in question i.e. that employees may not give their personal banking details to external companies[9]. This conclusion was based on the undisputed evidence tendered by Jacobs. The basis of the rule is self-evident; i.e. to prevent employees from misappropriating company funds. By virtue of the common cause fact that Dyanti sent Nosipho an email with his personal banking details it is evident that Dyanti breached the rule.

[35] It also does not make sense as to why Dyanti would have allowed himself to be pressurised by Nosipho to provide his personal banking details knowing the consequences of breaching the rule. Of special note here is the fact that Dyantyi was a Union Office Bearer and as such, ought to be considered to be better informed of the rules of Harmony.

[36] Further, even after having furnished Nosipho with his personal banking details, Dyantyi failed to notify Harmony that Southern Sun Hotel would be making payment of the refund into his bank account, despite being aware that he had breached the rule[10] Yet he phones Nosipho to enquire if the amount has been paid.

[37] A further complication in this matter is that there is an incomplete record of proceedings. The record runs into 155 pages. It covers the case of Harmony and the evidence of Dyantyi as well as his witness. Eight (8) CD's are transcribed in the record and it appears as if the tail end is missing, which relates to the status of Harmony. The Court is therefore satisfied that the record as it exists, lends itself to a full understanding of what occurred at the arbitration

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8 Arbitration bundle, at pp 18 - 20,

9 Award, para 86

10 Award, para 96

proceedings. To find otherwise, would in the view of this Court, cause severe prejudice to Dyantyi and NUM. The Court is therefore satisfied that the record as it stands is sufficient and adequate enough for this Court and any other party, reading it to obtain a clear and accurate understanding of the proceedings. This scenario is in contrast to the case of *Liwambano v Department of Land Affairs and Others*[11] where Leppan AJ held as follows:

> "the applicant expected this Court to consider his challenge to the third respondent's alleged misdirection on the facts established in the arbitration proceedings, and simultaneously the applicant expected this Court to ignore the incomplete transcript of evidence. These approaches were manifestly incompatible. This is not what this Court is asked to do nor is it acceptable for a Court to entertain a guessing game about what evidence was tendered in the arbitration proceedings."

[38] All this having been considered, this Court ex tempore dismissed the Application for Condonation and with it, the Cross Review, related to the challenge on the award pertaining to the substantive fairness.

[39] This was based on a proper consideration of the record of the proceedings and the finding relating to the substantive fairness which forms the basis of the Cross Review Application. The Commissioner, in his findings relating to substantive fairness which forms the basis of this cross-review application:

39.1 accepted that there was a valid rule in the workplace. This was not denied or challenged by the Dyantyi and NUM;

39.2 recorded that the evidence led, relating to the rule, was that "*the applicant was aware of the Rule, and the rule is reasonable and that it is consistently applied by the company*";

39.3 considered that in the face of a well-known and undisputed rule, Dyantyi could have addressed Nosipho's request differently and without breaching Harmony's rules

[11] [2012] 6 BLLR 571 LC.

39.4 considered the full conspectus of evidence placed before him by considering the evidence that Dyantyi testified in the disciplinary hearing that he knew about the rule and that he could be charged if the auditors found out about his conduct;

39.5 attached no weight to the written statement by Nosipho;

39.6 equally considered the fact that the Dyantyi did not report this incident to management.

[40] Accordingly he concluded that:

"On a balance of probabilities, the totality of evidence led, coupled with the applicant's conduct at the time, it is apparent that the Applicant's intention was to defraud the company [of] the money."

[41] The test to apply in determining whether the decision of a Commissioner is reviewable is that as formulated in ***Sidumo and another v Rustenburg Platinum Mines***[12]. The enquiry entails investigating whether the decision of the Commissioner is one which a reasonable decision maker could not have reached based on the full conspectus of evidence and the totality of circumstances before him. Thus the question is not whether or not the decision of the Commissioner is correct but whether it is reasonable based on the aforesaid.[13]

[42] In ***Sidumo***, it was held that a Commissioner, in making his decision, is required to consider all relevant factors and then undertake a balanced, equitable, and impartial assessment of them.[14]

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12 12 BLLR 1097 (CC).

13 See Sidumo and another v Rustenburg Platinum Mine Ltd and others [2007] 12 BLLR 1097 (CC) at paragraph 110 and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (7) BCLR 687 at paragraph 44.

14 Anton Myburgh, Determining and Reviewing Sanction after Sidumo, (2010) 31 ILJ 1 at page 5.

[43] In the case of ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others***[15], the court considered the following factors relevant to the reasonableness enquiry -

43.1 the nature of the decision;

43.2 identity and expertise of the decision-maker;

43.3 the range of factors relevant to the decision;

43.4 the reasons given for the decision;

43.5 the nature of the competing interests involved; and

43.6 the impact of the decision on the lives and well-being of those affected.[16]

[44] In his article entitled "***Sidumo v Rusplats: How have the courts dealt with it?***", Anton Myburgh summarises that the Commissioner's findings of fact will be unreasonable if it is -

44.1 unsupported by any evidence;

44.2 based on speculation by the Commissioner;

44.3 entirely disconnected from the evidence;

44.4 supported by evidence that is insufficiently reasonable to justify the decision; or

44.5 made in ignorance of the evidence that was not contradicted.[17]

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15 2004 (7) BCLR 687 (CC).

16 Bato Star Fishing (Pty) ltd v Minister of Environmental Affairs 2004 (7) BCLR 687 at paragraph 45.

17 Anton Myburgh, Sidumo v Rustplats: How have the courts dealt with it? (2009) 30 ILJ 1 at page 13.

[45] The award of the Commissioner is indicative of a full cognizance of all relevant evidence before him, he applied his mind clearly to such evidence and as a result, there is a rational connection between the evidence and the arbitration award subsequently handed down.

[46] In order for an arbitration award to be reviewable one has to ask the question "*Is the decision reached by the Commissioner one that a reasonable decision-maker would not reach?*" Only if the answer to this question is affirmative would a Commissioner's award be reviewable. The LRA has given the decision-making power to an arbitrating Commissioner and decision makers acting reasonably may reach different conclusions. It is submitted that the decision reached by the Commissioner in this matter relating to substantive fairness is clearly one that a reasonable decision-maker could reach.[18]

[47] Subsequent to the ***Sidumo*** [19] decision, the Labour Appeal Court had an opportunity to apply the test provided by the Constitutional Court. In essence the test provides that if a decision made by a Commissioner is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. Furthermore, the court stressed that the question is not whether the arbitration award and the decision of the Commissioner is one that a reasonable decision maker would not reach, but one that the decision maker could not reach.[20]

[48] In ***Palabora Mining Company Ltd v Cheetham***[21] it was held that although decision-makers, acting reasonably, may reach different conclusions, the LRA has given the decision-making power to the Commissioner and there it rests,

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18 Sidumo and another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC) at page1129 and 1131.

19 Sidumo (ibid).

20 Fidelity Cash Management Service v CCMA & others (2008) 29 ILJ 964 (LAC) at paragraph 97.

21 [2008] 6 BLLR 553 LAC.

unless it is concluded that a reasonable decision maker could not reach such a conclusion.

[49] These judgments also stress that the test laid down by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a Commissioner is reasonable, is a stringent test that will ensure that such awards are not lightly interfered with. Whether an arbitration award of a Commissioner is reasonable must, however, be determined objectively with due regard to all the evidence that was before the Commissioner and what the issues were before him or her.[22]

[50] In terms of the LRA, a Commissioner has to determine whether a dismissal is fair or not. A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.[23]

[51] In considering the Award, it is submitted that the Commissioner considered the probative value of, *inter alia,* the following evidence presented by Dyantyi regarding:

51.1 the Dyantyi's knowledge of the Third Respondent's rules;

51.2 the seriousness of the Dyantyi's misconduct; and

51.3 his defence and explanation for the misconduct.

51.4 by implication, the reasonableness of the rule and that dismissal was the appropriate sanction for contravention of the rule.

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[22] Fidelity Cash Management Service v CCMA & others, paragraphs 92, 97, 98 and 103.

[23] Anton Myburgh, determining and Reviewing Sanction after Sidumo, (2010) 31 ILJ.

[52] This Court finds that the Commissioner executed his duties, as contemplated by the provisions of the LRA in that he considered all the relevant evidence before him by Harmony, Dyantyi and NUM.

[53] In ***Stocks Civil Engineering v Rip NO and another***[24] the court dealt with the meaning of "*misconduct*" -

"*A court is entitled on review to determine whether an arbitrator in fact functioned as an arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the relevant evidence before him and having due regard to the applicable legal principles.*"[25]

[54] Again based on this, the findings on substantive fairness in the Arbitration Award were findings that a reasonable arbitrating Commissioner could have reached in the circumstances, and as a result, should be upheld.

[55] In ***Sidumo***[26], it was held that fairness in the conduct of the proceedings requires a Commissioner to apply his mind to the issues that are material to the determination of the dispute. One of the duties of a Commissioner in conducting an arbitration hearing is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason.

[56] Yet again based on the above, the Commissioner acted within his powers. The Commissioner was given the decision making power in terms section 138 of the LRA, which he exercised fairly insofar as his findings on substantive fairness are concerned.

[57] In ***Herholdt v Nedbank Limited***[27] the Court held as follows -

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24 [2002] 3 BLLR 189 (LAC).
25 Ibid, para 52.
26 Supra.
27 (701/2012) [2013] ZASCA 97 (5 September 2013).

"*[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. 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 inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.* ***Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.***" (own emphasis)

[58] In light of the aforesaid, it is submitted that Arbitration Award is rationally connected to the evidence presented before him on the aspect of substantive fairness during the arbitration proceedings and is therefore stands to be upheld.

[59] The Applicants have failed to provide any evidence that the Commissioner failed to take into account any fact or failed to place weight on any relevant fact which has led to an unreasonable outcome. The fact that the Commissioner reached conclusions around the substantive fairness of the Dyantyi's dismissal which the he and NUM do not agree with are, on their own, insufficient to review and set aside the Second Respondent's findings in this regard.

[60] In the premises and for all the considerations as outlined herein above the Application for Condonation and the Cross Review Application was dismissed.

C. <u>THE MAIN REVIEW</u>

The grounds for review

[61] Harmony sought to review the portion of the arbitration award in which the Commissioner finds that the dismissal of Dyantyi was procedurally unfair and

ordered that Harmony pay Dyantyi compensation equivalent to six months' salary.

[62] The essence of the Commissioner's finding was that the admission of hearsay evidence rendered the dismissal procedurally unfair. This was because there was no opportunity to cross examine Ms Mbambo and because the evidence was not corroborated.

[63] In coming to his conclusion it is submitted that:

63.1 the Commissioner failed to take into account the law relating to hearsay evidence as set out in the Law of Evidence Amendment Act 45 of 1988;

63.2 failed to appreciate that the statement made by Ms Mbambo was, to some extent at least, corroborated by other evidence;

63.3 erred in his view as to what constitutes a fair hearing as required by the LRA and the Code of Good Practice: Dismissal;

[64] It was further submitted that the order that Harmony pay Dyantyi an amount equal to six months' remuneration is arbitrary and is not supported by any reasoning or evidence as to why this amount should be paid.

[65] In the light of the above, it is submitted that the approach adopted by the Commissioner constituted a gross irregularity, alternatively misconduct as envisaged in Section 145 of the LRA and/or that the finding that the dismissal was procedurally unfair and the awarding of compensation were not decisions or orders that a reasonable decision maker could have made in the circumstances.

[66] Reference was made by Dyantyi and NUM to the following extract of the transcribed record:

> 'Commissioner: right for now this matter as we have discussed at the commencement of these arbitration proceedings that we will go as far as dealing with

two witnesses. We have done that and this matter remains part heard at this point. And I will make note that when we resume the employer is to call its third witness, because you said there are four.

Mr C Jacobs: Yes

Commissioner: Apart from that there is a condition and let me reiterate for the record that I have accepted the statement which was believed to be hearsay evidence by the union on the basis, the only condition that I have attached to that statement was that the deponent thereof needed to be called in, in the next sitting in ensuring that she comes in to corroborate that statement, because the way it is, even if it could be on affidavit the problem that is posed by written statements or affidavit to put it that way is that they are not being subjected to being cross-examined. An arrangement has been made with the Respondents that there is going to be sufficient time from now up to the time when this matter is re-enrolled for the Respondent to make the necessary arrangement in issuing a subpoena in respect of what witness. So I am again going on record in relation to that, thank you very much.

Respondent Representative: Thank you Mr Commissioner

Respondent Representative: Yes, Mr Commissioner the lady from the hotel the management does not want to release her due to the fact that she has been threatened previously and therefore she is not available to testify. The company refuse that she comes through to testify.

Commissioner: Uhm.

Respondent Representative: And should we then subpoena her to testify she, I do not know what she is going to testify.

Commissioner: Didn't we deal with that last time?

Respondent Representative: Yes Mr Commissioner remember the investigator testified on the statement that he took from the lady himself and then the request was we should go back and ask that the lady should come and testify, but the company feels that on the company's management side that due to the fact that she has been threatened they are not going to allow he to testify.

Commissioner: Uhm.

Applicant Representative: That is very serious allegation that they are making and they will have to justify the threatening part of it. I do not know who threatened him maybe the Respondent need to, I do not want people get a wrong impression here that we are victimizing people, who victimized that lady? He is victimized by whom?

Respondent Representative: I am sure you were in the case when it came up Mr Dlamini

Mr Dlaminin: Yes just to explain.

Commissioner: Can I be off record because the case for the employer has been closed; we will shortly just proceed with the Applicant's case. At this point we are just discussing logistical arrangements in relation to the witness who the company had earlier indicated works in the hotel and she is suppose to have come here.'

[67] Dyantyi and NUM, understandingly, argued that the admission of the statement of Nosipho by the Commissioner ought not to have been admitted as it was not corroborated by her. This, their contention was, left the Commissioner with only the version of Dyantyi, which ought to have been accepted.

[68] This Court has fully explained that the substantive fairness finding was correct based inter alia on the direct action of Dyantyi allowing monies belonging to his employer to be paid into his bank account, this being a flagrant violation of a rule of the company.

[69] The question now is 'was the finding of the Commissioner one which the *Sidumo* principle would render to be a decision which this Court has the right to interfere with?'

[70] In reaching a decision on the procedural fairness of the dismissal, the Commissioner found the following:

70.1 The chairman of the disciplinary hearing confirmed that he attached weight to Nosipo's statement. The reason he provided for doing so was that he was informed that Nosipo could not attend the hearing as she was intimidated and threatened with harm if she were to attend.

70.2 He acknowledged the reason given by the Applicant that it elected not to subpoena Nosipo as a witness in the arbitration proceedings because it did not want to strain the business relationship between itself and Southern Sun Hotel Durban.

70.3 However, the Commissioner then held that the Applicant could have ensured that the witness testify by speaker phone during the disciplinary proceedings. He found that the Applicant's decision not to call Nosipo as a witness during the disciplinary proceedings but to use her statement instead, amounted to a procedural irregularity.

[71] Harmony seeks to review the portion of the arbitration award in which the Commissioner finds that the dismissal of Dyantyi was procedurally unfair and orders that Harmony pay Dyantyi compensation equivalent to six months' salary. It was intended in argument that the matter was a principal issue and not in itself related to the monetary value of the order.

[72] Much has been made of Nosipho's affidavit, both at the disciplinary hearing as well as the arbitration itself. What is of utmost significance is that the award, in making the finding on substantive fairness relied primarily on the existence and breach of a company rule which was known to Dyantyi, was reasonable and was consistently applied by the company.

[73] The rule quite simply here was that Harmony's employees could not provide personal banking details to an external company for the purpose of receiving money belonging rightfully to the company.

[74] This has never been in issue. Dyantyi, at all times, conceded that he had given his banking details to Southern Sun Hotel and that he knew this was against the company rule. In fact, the record of the disciplinary hearing reflects Dyantyi's confirmation that, if the money was paid into his personal banking account, he would be charged. This statement can be interrupted as being indicative of Dyantyi's state of mind.

[75] Of equal concern is the appeal hearing submission of NUM which, *inter alia*, states that "[y]es there are rules and rules are to be broken, but when you analyze the situation, there are circumstances that made the accused (sic) break the rules."

[76] In terms of Section 142 of the LRA:

> '(1) A Commissioner who has been appointed to attempt to resolve a dispute may-

(a) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute;

(b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the Commissioner to be questioned or to produce that book, document or object;

(c) call, and if necessary subpoena, any expert to appear before the Commissioner to give evidence relevant to the resolution of the dispute;

(d) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute;

(e) administer an oath or accept an affirmation from any person called to give evidence or be questioned;

(f) at any reasonable time, but only after obtaining the necessary written authorisation-

(i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there; and

(ii) examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the dispute; and

(iii) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement; and

(g) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission.

(2) A subpoena issued for any purpose in terms of subsection (1) must be signed by the director and must-

(a) specifically require the person named in it to appear before the Commissioner;

(b) sufficiently identify the book, document or object to be produced; and

(c) state the date, time and place at which the person is to appear.

(3) The written authorisation referred to in subsection (1) (f)-

(a) if it relates to residential premises, may be given only by a judge of the Labour Court and with due regard to section 13 of the Constitution 39, and then only on the application of the Commissioner setting out under oath or affirmation the following information-

(i) the nature of the dispute;

(ii) the relevance of any book, document or object to the resolution of the dispute;

(iii) the presence of any book, document or object on the premises; and

(iv) the need to enter, inspect or seize the book, document or object; and

(b) in all other cases, may be given by the director.

(4) The owner or occupier of any premises that a Commissioner is authorised to enter and inspect, and every person employed by that owner or

occupier, must provide any facilities that a Commissioner requires to enter those premises and to carry out the inspection or seizure.

(5) The Commissioner must issue a receipt for any book, document or object seized in terms of subsection (4).

(6) The law relating to privilege, as it applies to a witness subpoenaed to give evidence or to produce any book, document or object before a court of law, applies equally to the questioning of any person or the production or seizure of any book, document or object in terms of this section.

(7) (a) The Commission must pay the prescribed witness fee to each person who appears before a Commissioner in response to a subpoena issued by the Commissioner.

(b) Any person who requests the Commission to issue a subpoena must pay the prescribed witness fee to each person who appears before a Commissioner in response to the subpoena and who remains in attendance until excused by the Commissioner.

(c) The Commission may on good cause shown waive the requirement in paragraph (b) and pay to the witness the prescribed witness fee.

(8) A person commits contempt of the Commission-

(a) if, after having been subpoenaed to appear before the Commissioner, the person without good cause does not attend at the time and place stated in the subpoena;

(b) if, after having appeared in response to a subpoena, that person fails to remain in attendance until excused by the Commissioner;

(c) by refusing to take the oath or to make an affirmation as a witness when a Commissioner so requires;

(d) by refusing to answer any question fully and to the best of that person's knowledge and belief subject to subsection (6);

(e) if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a Commissioner;

(f) if the person wilfully hinders a Commissioner in performing any function conferred by or in terms of this Act;

(g) if the person insults, disparages or belittles a Commissioner, or prejudices or improperly influences the proceedings or improperly anticipates the Commissioner's award;

(h) by wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings;

(i) by doing anything else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.

(9) (a) A Commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8).

(b) The Commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11).

(10) Before making a decision in terms of subsection (11), the Labour Court-

(a) must subpoena any person found in contempt to appear before it on a date determined by the Court;

(b) may subpoena any other person to appear before it on a date determined by the Court; and

(c) may make any order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the person's right to represent a party in the Commission and the Labour Court be suspended.

(11) The Labour Court may confirm, vary or set aside the finding of a Commissioner.

(12) If any person fails to appear before the Labour Court pursuant to a subpoena issued in terms of subsection (10) (a), the Court may make any order that it deems appropriate in the absence of that person.'

[77] In this instance, since the Commissioner was so inclined to make an adverse order against the employer, he was empowered to himself establish the veracity of the statement. This would have involved the issuing a subpoena for Nosipho to appear before the Commissioner, after the prescribed procedure being adhered to or if sec 142 (1) (d) is to be literally interpreted, to "call" Nosipho, we accept this to be by way of a telephone call or more appropriately, by way of a teleconference, to be questioned on her statement.

[78] The essence from the outset of the CCMA's existence has been to be a forum which is user friendly, practical and effective, with a relaxed approach to formalities whilst still exercising an established structure of process and procedure.

[79] It is disconcerting that so much of this review has hinged on this statement of Nosipho and has endured for five years to reach this stage.

[80] This Court expresses its view that Commissioners be robust in applying the considerable powers conferred on them in terms of section 142 to establish facts for themselves, where circumstances so warrant it.

[81] This matter is a case in point. The use of these wide powers and the ambit created for the Commissioner to delve into and seek out the true facts have long and wide consequences in terms of pursuit, application and finality of ensuring that all possible material, both factual and otherwise, be properly extracted and become part of the collage of evidence, all of which, contribute to the assurance that the Commissioner had well and truly applied him or herself to the enormity of the task of collating and distilling of all the evidence in reaching a conclusion on

which resonates energy, reason, process, procedure, knowledge and application in the dispensing of justice.

[82] The snowball effect of such an approach would be the confidence created of promoting the Commissioner as “custodian” of the process. The deliberate absence of the legal formalities and the tendency towards informality does, to an extent, create for the Commissioner the wide freedom to utilise the enabling powers of section 142 of the LRA to achieve the same objects of exchange of pleadings and documents which characterise Labour Court proceedings

[83] In the South African legal system, on all the strata of labour dispute bodies, from the CCMA to the LAC and in some instances, as far up as the Constitutional Court, it is a fact that the case load has resulted in a bottle neck blockage and this presents a huge challenge to the speedy and effective dispensing of justice. In the case in point, which emanates from a dismissal which stemmed from an incident involving R2 518.00, the matter has endured five years to reach the Labour Court hearing and has involved the employment of a trade union, attorney and an advocate on the part of the Applicant as well as, on the part of the Respondent, all this at considerable cost and this without even considering the cost of the State itself. It would be interesting to ascertain whether an exercise has been undertaken to calculate the cost of matters like this and others to be brought to this level of adjudication.

[84] This is indicative of an urgent need for an intermediary intervention to stem costs and to advance the pillars of justice, namely, speed, effectiveness and cost efficiency.

[85] A possibility is the implementation of a screening process which distills and would by so doing, identify matters like this, which could have effectively been resolved earlier, by the process of mediation, conciliation and facilitation. This would, obviously be outside the context of the CCMA and its process in terms of section 138. The reference here is obviously within the ambit of the Labour Court itself.

[86] This Court is not convinced that the finding of a procedural irregularity is well founded. Even if the Chairperson of the disciplinary hearing had totally disregarded the statement of Nosipho, the same finding would have been reached based on the essence of the decision being the existence of the rule of the company.

[87] Of critical importance is the fact that the statement of Nosipho was not objected to at the disciplinary hearing or the arbitration. It was, therefore, perfectly admissible evidence and as such, was what it purported to be.

[88] This aspect of the Commissioners decision is therefore one which a reasonable decision maker would not have reached based on the full conspectus of evidence and the totality of circumstances before him.

[89] This Court is therefore of the view that the question is not whether the Commissioner was correct in finding procedural unfairness and awarding Dyantyi six months' compensation but whether it was a reasonable decision.

[90] This Court believes not.

[91] It is also to be stated that the submission that the Commissioners failure to give reasons for the compensation awarded by him, is in itself a reviewable irregularity is totally rejected.[28]

[92] In the premises, the Court makes the following order:

1. The Application for condonation and the cross-review is dismissed;

2. The main review is upheld and the order of the Commissioner which reads:

    2.1 The dismissal of Sthembele Dyantyi by Harmony Gold Mine Company is substantively fair but procedurally unfair;

[28] *Absa Brokers (Pty) Ltd v Mashoana N.O and Others* (2005) 26 *ILJ* 1652 (LAC) at paras 44 and 47, *Bezuidenhout v Johnson N.O. and Others* (2006) 27 ILJ 2337 (LC).

2.2 Harmony Gold Mine Company must pay Sthembele Dyantyi compensation equivalent to six (6) months salary calculated at the rate of his salary at the time of dismissal i.e. R10 079 x 6 = R60 474.00.

2.3 The amount of R60 474 must be paid to Sthembele Dyantyi within fourteen (14) days of this award.

Is substituted by:

"The dismissal of Sthembele Dyantyi by Harmony Gold Mine Company is substantively and procedurally fair."

2.5 No order as to costs is made

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Rawat, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant	Sherisa Rajah
Instructed by:	Webber Wentzel
For the Third Respondent:	Phineas Motaung
Instructed by:	Nomali Tshabalala Attorneys