

SOUTH AFRICA / JUDGMENT

Association of Mineworkers obo Bakang v Tshipi Ntle Manganese Mining (Pty) Ltd (JR1045/21) [2025] ZALCJHB 30 (24 January 2025) [2025] ZALCJHB 30

COURT

Labour Court Johannesburg

BEFORE

F I Baloyi

CASE / FILE NUMBER

JR1045/21

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FLYNOTES:

LABOUR

– Dismissal – Sexual
harassment – Peeped
through window of ladies changing room – Female night-shift
worker was half-dressed after showering – Male
employee then
entered the changing room – CCMA commissioner finding
dismissal procedurally and substantively fair –
Commissioner's finding that employee not a credible witness
cannot be faulted – Employee changed his versions
–
Commissioner properly assessed all the evidence and came to
reasonable conclusion – Employee was properly found
guilty
of sexual harassment – Review application dismissed.
THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case

	No: JR1045/21
	In
the matter between:	ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION OBO MOSHE BAKANG Applicant and TSHIPI NTLE MANGANESE MINING (PTY)LTD First Respondent COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent CHITANE SOZA N.O Third Respondent
Heard:	2 July 2024
Delivered:	24 January 2025 This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them by email. The date for hand-down is deemed to be 24 January 2024.
Summary:	Application to review and set aside an arbitration award. The arbitration award falls within the bands of reasonableness and is justifiable in law. The finding that the applicant is guilty of sexual harassment and that his dismissal was fair is one that a reasonable decision maker may reach. Held (1): The application for review is dismissed. Held (2): There is no order as to costs.

JUDGMENT

BALOYI, AJ

Introduction

- [1] This is an application to review and set aside the arbitration award made by the third Respondent (commissioner) acting under the auspices of the second Respondent (CCMA).

- [2] The Commissioner ruled that the dismissal of Moshe Bakang (Bakang) was procedurally and substantively fair. The application is brought on behalf of Bakang by the first Respondent (AMCU). The application is opposed by the first Respondent.

The

facts

- [3] Bakang was employed as a Sampler Preparer by the first Respondent from 2017 until his dismissal. On or about 3 December 2019, Bakang was charged with one count of misconduct which reads as follows:[1]

‘Sexual Harassment, non verbal conduct such as unwelcome gestures and indecent exposure towards a member of an opposite sex in that on 5 November 2019 at approximately 04h45 am you peeped through the lady’s bathroom window whilst the lady was getting dressed and you consequently entered the laddie’s [sic] bathroom without authority.’

- [4] The lady concerned in this saga is one M[...] B[...] (B[...]) who at the time of the alleged misconduct was employed by a contractor that was doing laundry for the first Respondent.
- [5] After being charged, Bakang was brought before a disciplinary hearing, he was found guilty and was dismissed. An internal appeal was unsuccessful.
- [6] The matter was referred to the CCMA for conciliation and ultimately arbitration. At the arbitration hearing, the first Respondent called three witnesses and the Applicant (Bakang) testified and called two witnesses.

Evidence of M[...] B[...]

- [7] B[...] testified that she reported for duty on the night of the 4th of November 2019. In the early hours of the 5th of November 2019, she, and her supervisor Didimalang Baepi (Baepi) went to the ladies' changing room to bath or shower before knocking off. The time was around 4h:45am. After showering, B[...] went in front of the mirror to apply lotion. Whilst busy applying lotion and half naked in her underwear, she could see through the mirror that the window behind her was slowly opening and a person was looking at her. At this time, Baepi was inside the toilet.
- [8] B[...] called Baepi three times to come. At this stage, Bakang entered the changing room where B[...] was still half naked and Baepi had come out of the toilet. B[...] then said to Bakang that “you are so brave to enter the change House while you were staring me through the window”. [2]
- [9] B[...] testified that Bakang came inside the changing room very relaxed and looked at her with his hand on his cheek. B[...] told Bakang to get out of the room and that she will report the matter. [3]

- [10] B[...] testified that on the 6th of November 2019, Bakang tried to call her numerous times and she did not answer his WhatsApp calls. On the same day (6 November 2019) Bakang wrote her a WhatsApp message apologising to her.[4]
- [11] On the 14th of November 2019, B[...] reported the matter to the first Respondent Human Resources Department and she made a statement.[5]
- [12] B[...] testified that she felt very sad about what Bakang did to her. She was referred for counselling by the first Respondent.[6]
- [13] In cross-examination, B[...] testified that she had no relationship with Bakang and only knew him as a colleague. She testified that it was not dark at the time the incident (peeping) happened and there were also lights around.[7] When asked whether she spoke to Bakang whilst he was at the window, she testified that she did not but instead, she called Baepi who was inside the toilet.[8] She did not talk to Bakang whilst he was at the window she saw him through the large mirror that was in front of her. The window was opened because the previous shift did not close the window when they knocked off.
- [14] She testified that Baepi saw Bakang inside the changing room after she came out of the toilet. When asked why Baepi was not called as a witness at the disciplinary hearing, she answered that her statement (Baepi statement) did not reflect the correct facts of the events that occurred on the 5th of November 2019.[9]

Evidence of Kelebogile Maphage

- [15] The second witness called by the first Respondent was Kelebogile Maphage. She testified that she holds the position of a Laboratory Officer. She made a statement in relation to the incident involving Bakang and B[...]. She received a WhatsApp message on the 5th of November 2019 from B[...] to call her. After calling B[...], Boeng explained what Bakang has done to her that morning. Maphage reported the matter to IR Specialist (Matthews).
- [16] After some weeks, Maphage was requested by the first Respondent to suspend Bakang pending a disciplinary hearing. She testified that she spoke to Bakang about the events of the 5th of November 20219. Bakang confirmed that he went to the change house on the time and date of the incident. He was waiting for his friends in the vicinity when he heard B[...] calling his name and that is when he went inside the change room where B[...] was.[10]
- [17] In cross-examination, Maphage confirmed that the case of B[...] was reported in the morning. She confirmed that she was Bakang's supervisor at the time of the incident.
- [18] When it was put to her that her evidence was hearsay evidence because she did not witness the incident, she denied it, contending that the events were narrated to her by the complainant (B[...]) and Bakang.

- [19] She testified that when the windows of the change room are closed you cannot see the person inside but you can see the shadows. She further testified that when the windows are opened you can clearly see the person inside the change room.[11]

Evidence of Michael Patrick Groenwald

- [20] The third and final witness on behalf of the first Respondent was Michael Patrick Groenwald (Groenwald). He testified that he was employed in 2012 and he holds the position of Laboratory Manager. The charge against Bakang related to sexual harassment (non-verbal). His role during the disciplinary hearing was to put the charge against Bakang. He testified that Bakang was given enough time to prepare for the hearing and to appoint a legal representative.
- [21] With reference to the sexual harassment policy, he testified that Bakang's conduct on the 5th of November 2019 amounted to sexual harassment[12]. He testified that any form of sexual misconduct or harassment is taken very seriously by the first Respondent and the sanction is dismissal. Based on the conduct of Bakang, the employment relationship has been breached. [13]
- [22] In cross-examination, Groenwald confirmed that he was not present when the alleged harassment took place he was informed and he spoke to the complainant (B[...]).
- [23] He testified that when the windows in the change room are closed, it is not possible to see inside however, when the windows are opened you see the inside of the change room[14].
- [24] Groenwald confirmed that the statement of Baepi was not used during the disciplinary hearing. B[...] mentioned that the statement of Baepi did not reflect how the incident occurred.[15]

Evidence of Moshe Bakang

- [25] Bakang testified that he reported for duty on the night of the 4th of November 2019. In the late hours of the morning of the 5th of November 2019, he went past the change house. As he was walking past by the window of the change house he heard someone inside the change house screaming.[16] He then rushed to the door of the change house to give assistance. When he arrived at the door, B[...] told him that she wanted to see who the person was so that she can report.
- [26] Bakang testified that he did not see B[...] inside the change room because if you are at the door, you cannot see the person inside. He further testified that he did not see Baepi (Didi as she is called) inside the change house.
- [27] Bakang denied that the allegation that he looked through the window inside the ladies' change house. He testified that because of the height of the window, it was impossible for him to look through the window. It will be possible to look through when he has climbed on something.[17] He confirmed that you can only see the inside of the changing room when the window is opened. Furthermore, it is not possible to open the window from outside

unless the window is slightly opened. According to Bakang, the windows of the change room are always closed because this is where people shower and change.

- [28] Bakang confirmed that he tried to call B[...] after the incident and she did not answer his calls or return his WhatsApp messages. He further confirmed that in one of the messages he asked for forgiveness. His asking for forgiveness did not mean that he did what she alleges he has done, he was asking for forgiveness because she was angry.[18]
- [29] He testified that he does not know why Baepi did not attend the hearing as she was in the change house on the date of the incident. Furthermore, the statement of Baepi was not used at the disciplinary hearing.
- [30] Bakang was referred to the sexual harassment policy and testified that he was not aware of the policy and it was for the first time he saw it.[19]
- [31] In cross-examination, Bakang was asked to read his statement for the record.[20] He confirmed that the statement is a true reflection of what is stated therein. He testified that as he was passing in front of the change house he heard a person screaming.
- [32] It was put to Bakang that he informed Maphage that the person who screamed was calling his name, to which he conceded.[21] Bakang testified that he did not hear the person screaming to be calling his name and the person went to the side of the door when he responded by asking who is it.[22]
- [33] Bakang testified that he did not know the person who was screaming and the person did not scream his name. Bakang testified that B[...] said she was with Baepi (Didimalang).
- [34] Bakang testified that he turned away in front of the changing room because B[...] was not coming out and she was talking to someone inside and further that if she needs help that person will help her. He testified that he only met B[...] and Baepi when he went to drop the PPE and that is when he realised that it was B[...] who was screaming.
- [35] When asked whether he asked Baepi as to what was happening inside the change room, Bakang stated that he did not ask her because B[...] had already told people what had happened. He testified that he was shocked by what she said about him. He maintained that he did nothing Boeng.
- [36] When asked why he spoke to B[...] by WhatsApp, he stated that he was worried about her and that she was angry and he asked for forgiveness. The forgiveness related to the fact that she thought he had looked at her by the window whilst he simply passed by.
- [37] Bakang disagreed when it was put to him that Maphage during her testimony stated that, he (Bakang) said he heard B[...] call his name.[23] He testified that he had never spoken to B[...] before and there was no bad blood between them.

Evidence of Didimalang (Didi) Baepi

- [38] The second witness for the Applicant (Bakang) was Didi Baepi. Baepi testified that she was employed by the contractor who was doing laundry for the first Respondent. She was a supervisor and supervising two employees one them was B[...]. Her relationship with B[...] was good. B[...] and Bakang did not have any relationship.
- [39] She testified that on the date of the incident involving Bakang and B[...] she was on duty. While they were at the change house she was in the toilet whilst B[...] was bathing. While she was in the toilet, B[...] called three times and she responded that she was coming. On her way out she could hear that there was an argument. B[...] told her that there was someone who was looking at her through the window. Baepi was inside the change house whilst the other person was outside and she recognised the voice of the person who was outside as that of Bakang. She did not see Bakang physically outside the change house. She testified that the window of the changing room was a bit open.
- [40] Baepi testified that when the window is closed one can see the shadow inside the change room. When the window is opened you can see the person who is passing.[24]
- [41] Baepi confirmed that she was not called to testify at the disciplinary hearing and she does not know when the disciplinary hearing was held.
- [42] Baepi testified that she did not see Bakang inside the change room. The statement by B[...] that Bakang came inside is not true.[25]
- [43] In cross-examination, Baepi was asked to explain in detail what happened in the change room. She explained that when they arrived at the change room she went to the toilet whilst B[...] took a bath. Whilst still in the toilet, B[...] called her at least three times. When she got out of the toilet there was an argument between B[...] and a person who was outside the change room. She recognised the voice of the person outside as that of Bakang, she did not see Bakang. B[...] then explained to her that he, Bakang was looking at her through the window. At that time B[...] was in her underwear and bra. In that argument, B[...] was asking Bakang why he was looking at her through the window. She however did not hear the response from Bakang. B[...] was very angry at that moment.
- [44] Baepi testified that B[...] did not call Bakang but she called her and she was calling loudly. The calling did not sound like there was an emergency. She testified that, when she and B[...] got out of the change room, Bakang was standing outside alone.[26]

The grounds for review

- [45] The test on review need not be rehashed, suffice to state that the question the Court needs to answer is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach.[27] The test is clearly a stringent one, to ensure that arbitration awards are not lightly interfered with.[28]

- [46] Further in assessing the reasonableness of a Commissioner's award, the enquiry as enunciated in Goldfields[29] is whether the Commissioner in terms of his /her duty to deal with the matter with minimum of legal formalities, afforded the parties a full opportunity to have their say in respect of the dispute; properly identified the dispute he/she is required to arbitrate; understood the nature of the dispute he/she was required to arbitrate ,dealt with the substantial merits of the dispute, and most importantly arrived at a decision that another decision-maker could reasonably have arrived at based on the evidence that was placed before him/her.
- [47] As to the grounds for review, the Applicant contends that the Commissioner committed misconduct in relation to his duties, that the commissioner committed gross irregularity in the conduct of the arbitration proceedings and that the Commissioner committed inexcusable errors of law.

Evaluation

- [48] The Commissioner's observation or statement that the evidence led by the two parties required serious analysis to get to an outcome, is correct.[30] This matter hinges largely on the credibility of the witnesses and the probabilities.
- [49] In Assmang Ltd (Assmang Chrome Dwaarsriver Mine v Commission for Conciliation, Mediation and Arbitration and Others[31],this Court held the following:
- ‘[35] In deciding on an alleged unfair dismissal dispute, a commissioner of the CCMA goes by balancing the probabilities. In making a decision on the dispute before him or her, the appointed commissioner establishes facts by a preponderance of probability. That is the ordinary standard of proof in civil proceedings.
- [36] It is, accordingly, a CCMA commissioner's duty to weigh up or balance the probabilities. It has to be accepted that in so doing, the commissioner would not exclude every reasonable doubt. The standard of proof in civil proceedings is lower than that the criminal standard of proof beyond reasonable doubt.
- [37] It is worth reiterating that there is a clear distinction between probabilities and credibility. At times, these two concepts are not dealt with in their proper context. In my view, the probabilities are at the heart of the enquiry in arbitration proceedings. They have to be established as they are decisive to the outcome.’
- [50] In my view, the Commissioner's finding that Bakang was not a credible witness cannot be faulted. This is clear from his testimony during cross-examination, he changed his versions. In his statement that was read at the arbitration hearing, he claimed that B[...] called him. This is the same statement that he gave to Maphage that B[...] called him. Maphage 's evidence was not challenged during her cross-examination. Furthermore, he claimed not to have spoken to B[...] whilst he was standing outside the door of the changing room. According to Baepi (Didi), there was an argument between B[...] and Bakang which she

heard whilst she was inside the toilet and when she came out of the toilet. Baepi recognised him by his voice and when they came out of the changing room, Bakang was still standing outside.

[51] In all probabilities, Bakang peeped through the window when B[...] was taking a shower or whilst she was applying lotion standing in front of the mirror and naked. These probabilities are supported by the fact that the window was opened as testified by B[...] and Baepi, Bakang was the only person in that vicinity and on his own evidence he passed by at that specific time. Bakang heard B[...] calling Baepi (who he contends was screaming). B[...] and Bakang had an exchange of words (an argument as per Baepi's evidence). On these facts alone, there is no other conclusion that can be drawn other than that Bakang was the person peeping and was seen by B[...] through the mirror. Furthermore, it would not make sense for Bakang to ask for forgiveness for things he did not do. On his own evidence, he claimed to have left the changing room when he realised there were actually two people inside the changing room, so his help was not required. If this is the case, the apology would not have been necessary.

[52] In my view, the grounds for review have no merits. The Commissioner has properly assessed all the evidence and come to a reasonable conclusion. Bakang was properly found guilty of sexual harassment.

Conclusion

[53] In summary, the arbitration award is justifiable, unassailable and one that a reasonable decision maker may reach. Accordingly, the review applicable falls to be dismissed.

[54] In the results, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

F.I Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: A. L. Cook

Instructed by: LDA Incorporated

For the Respondent: R Itzkin

Instructed by: ENS Africa

[1] CCMA bundle, page 588 -589.

- [2] Transcribed record, page 40, line 10-14.
- [3] Transcribed record, page 44, line 1-6.
- [4] CCMA bundle, page 593.
- [5] CCMA bundle, page 600 – 601.
- [6] Transcribed record, page 77, line 2-4, page 78, line 8 -9.
- [7] CCMA bundle, page, 121.
- [8] Transcribed record, page 88, line 10 – 14.
- [9] Transcribed record, page 101, line 5-20.
- [10] Transcribed record, page 142, line 1-6.
- [11] Transcribed record, page 153, line 1-19, page 154, line 14-20.
- [12] CCMA bundle, page 530 – 529.
- [13] Transcribed record, page 183, line 1-20.
- [14] Transcribed record, page 193, line 1-11.
- [15] Transcribed record, page 203, line 15-18
- [16] Transcribed record, page 227, line 1-20.
- [17] Transcribed record, page 233, line 1-19, page, 234, line 1-8.
- [18] Transcribed record, page 244, line 1-20.
- [19] Page 263, line 3-7.
- [20] CCMA Bundle, page 604.
- [21] Transcribed record, page 282, line 1-13.
- [22] Transcribed record, page 283, line 1-19.
- [23] Transcribed record, page 315, line 8-19, page 316, line1-19.
- [24] Transcribed record, page 402, line 1-10.
- [25] Transcribed record, page 404, line 7-14.
- [26] Transcribed record, page 460, line 14-19.
- [27] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others
(2007) 28 ILJ 2045;
[2007] 12 BLLR 1097 (CC).

- [28] Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others (Fidelity) [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) at paras 98 and 100.
- [29] Gold Fields Mining South Africa (Pty) (Kloof Gold Mine) v Commissioner for Conciliation, Mediation & Arbitration & others
- [2007] ZALC 66; [2014] 1 BLLR 20 (LAC),
- (2014) 35 ILJ 943 (LAC) at para 20.
- [30] Index to pleadings, page 30, para 49 (of the award).
- [31]
- [2015] 6 BLLR 589 (LC); [2015] ZALCJHB 4.

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