

SOUTH AFRICA / JUDGMENT

Impala Platinum Limited v Mothiba NO and Others (JR2567/13) [2016] ZALCJHB 355; (2017) 38 ILJ 636 (LC) (16 September 2016) [2016] ZALCJHB 355

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JR2567/13

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THE

LABOUR COURT OF SOUTH AFRICA

HELD

AT JOHANNESBURG

Case

no: JR2567/13

Of

interest to other judges

In

the matter between:

IMPALA
PLATINUM LIMITED
First
Applicant
and
HARRY
MONAGENG MOTHIBA N.O.
First
Respondent
DAVID
MSIZA N.O.
Second
Respondent
OUPA
THLAPHI N.O.
Third
Respondent

Heard:	15 September 2016
Delivered:	16 September 2016
Summary:	(Review – Imposition of administrative fine under s 55B of MHSA – fine imposed in breach of right to a fair hearing under PAJA)

JUDGMENT

LAGRANGE J

- [1] This is a review application of a decision of the Principal Inspector of Mines ('the principal inspector') on or about 8 or 9 April 2013 to impose an administrative fine of R1 million on the applicant company ('the mine') acting in terms of section 55B (1) (b) of the Mine Health and Safety Act, number 29 of 1996 ('the MHSA'). The matter was originally opposed by the respondents in their official capacity as inspectors employed by the Department of Minerals Resources. On 23 August 2016 the respondents abandoned their opposition to the application.
- [2] The occasion giving rise to the imposition of the fine was the death of an employee who had gone into a section of the mine which was no longer a working area and who had suffered fatal burn injuries from a gas explosion, apparently caused by him lighting a cigarette.
- [3] The mine originally sought to review the decision based on numerous provisions of the Promotion of Administrative Justice Act, 3 of 2003 ('PAJA'), including that the jurisdictional prerequisites for making it were absent because there was no objective basis for the factual findings of the principal inspector which could support a conclusion that the relevant sections and regulations had been breached by the mine. However, at the hearing of the application, the mine confined its review to an attack on procedural unfairness in terms of section 6 (2)(c) read with section 3(2)(b)(ii) of PAJA.[1] In particular, this concerns the principal inspector's alleged failure to give the mine a reasonable opportunity to make representations in relation to the factors on which he ultimately based his decision.
- [4] The relevant portion of Section 55 B of the MHSA states:
- "[doja29y1996s55B]55B Principal Inspector of Mines may impose fines*
- (1) The Principal Inspector of Mines, after considering the recommendation and any representations made in accordance with section 55A, may-
- (a) disregard the recommendation;
- (b) impose a fine not exceeding the maximum amount mentioned in Table 2 of Schedule 8; or

- (c) refer the matter to the prosecuting authority for a decision as to whether the employer should be charged with an offence.”

(emphasis added)

- [5] The only document provided to the mine prior to its making representations why a fine should not be imposed was the recommendation of another inspector, the third respondent, issued on 28 February 2013. The recommendation provided that a fine be imposed on the mine on the basis that on 17 October 2012 (the date of the fatal accident) it had failed to comply with section 5(1) and regulations 9.1(4) and 10.1(2)(a) of the MHSA. The reasons for his conclusion that the relevant provisions had been breached may be stated in summary form as follows:

5.1 A standard work procedure of the mine (SWP-10.02.02) stipulated that temporary abandoned ends should be treated as a standard development and ventilation maintained with a barricaded erected at the last point of through ventilation to prevent inadvertent entry by unauthorised persons.

5.2 Permanent abandoned ends had to be walled up and provided with a bleed pipe for flammable gas testing and flammable gas signs had to be displayed on the wall.

5.3 The employer had ensured that all employees were conversant with the work standard in question.

5.4 In particular, there was a previous incident on 22 October 2010 where an operator was fatally gassed when he inhaled methane and carbon monoxide in an abandoned area which was not barricaded as per the mine standard. Following that incident and instruction was issued under section 54 (1) (k) of the MHSA and the employer showed its commitment to prevent similar substandard conditions prevailing in future.

5.5 Following the incident on 17 October 2012 where the employee had entered an abandoned area containing methane gas similar deviations regarding the non-compliance with barricading of abandoned areas was observed and a further instruction was issued in terms of section 54 (1) (a) of the MHSA.

5.6 In light of the above, the employer had demonstrated a failure to comply with the remedial actions report “...by allowing free entrance of employees into abandoned areas which are regarded as unsafe”.

- [6] The principal inspector’s decision to impose the fine recorded that he had taken into account the inspector’s recommendations and the mine’s response in arriving at his decision. In his letter of 1 June 2013 the principal inspector identified the following reasons, which are summarised, for the imposition of the fine:

6.1 A failure of the mine to comply with section 5 (1) read with regulation 9.1 (4) of the MHSA. This entailed an alleged failure of the mine to take a reasonably practicable measures to ensure that no employee is exposed to any health hazard at or emanating from, any working place where

work has ceased permanently. The principal inspector claims that from the investigation conducted on 17 October 2012 due to the poor correction of barricades, employees were able to freely enter abandoned areas that were neither barricaded nor ventilated adequately. Moreover he also claimed that the employer acknowledged such failure on its part in its own representations.

6.2 A failure of the mine to comply with section 5 (1) read with regulation 10.1 (2)(a) of the MHSA. This finding was based on the mine's alleged failure to take reasonable practicable measures to prevent persons being injured in a hazardous location as a result of a gas ignition in circumstances where the shaft in question contained more than 0.5% concentration of flammable gas in the air. This finding was ostensibly based on records provided by the mine to the regional office on flammable gas measurements taken by it. In terms of those measurements, the mine had failed to identify the number 11 C shaft where the accident occurred as a hazardous location and take the necessary precautionary steps.

6.3 Sections 2 (1) (b), 3 (1) (c), 4 (3) (b), 5

(1) and regulations 9.1 (4) and 10.1 (2) (a) which impose various duties on an employer in terms of the MHSA.

6.4 The mine's alleged failure to prevent a significant number of gassing incidents and intersections since 2006 that had resulted in exposing employees to health hazards in the form of potential flammable gas related incidents.

6.5 An incident in October 2010 in which an employee at the same shaft had entered an area that was not adequately barricaded and had suffered fatal gassing.

[7] In determining the value of the fine, which is the maximum fine he could impose in terms of the MHSA, the principal inspector cited the following considerations he took into account:

7.1 the level of risk to which employees were exposed in consequence of the contraventions;

7.2 the number of employees exposed to the hazards;

7.3 steps taken by the mine to address the risk posed by the hazard;

7.4 the mine's health and safety risk profile as indicated by the history of reportable incidents at the mine;

7.5 the mine's history of compliance with the MHSA and associated regulatory instruments, and

7.6 the mine's general neglect, complacency or wilful non-compliance.

[8] In addition to taking into account the inspectors report and the mine's response, the principal inspector said that he also based his decision to impose the fine on "...factual information established during the investigation, acknowledged for correctness and signed for by the employer representative in the inspection report (attached as Annexure "A") as well as the written representation form (attached as Annexure "B")." In noting the

‘significant number’ of gassing incidents which he mentioned as having taken place since 2006, the principal inspector also had regard to Annexure “C” to his reasons, which was a register provided by the company to the Mine Health And Safety Inspectorate recording flammable gas readings

for number 11 and 11 C shaft’s for a period from about 2009 to

2013. None of these documents featured in the recommendations made by the inspector to the principal inspector. In addition, in his decision the principal inspector refers to the records of “the enquiry” as evidence of the mine’s failure to comply with regulation 10.1 (2)(a). Yet the report of enquiry which was conducted by the inspector on 15 February 2013 was only finalised on 22 April 2013, whereas the principal inspector made his decision in the first week of April. This demonstrated that the principal inspector at least had sight of the record of that enquiry and took account of it in making his decision. When the record of the enquiry was filed in the review application the final report of the inspector was included as part of the record. Neither the record nor the report, if it had been finalised before the decision was made, were provided to the mine before it made its representations, even though it played a significant role in the deliberations of the principal inspector.

[9] Moreover, despite much significance being attached by the principal inspector to statements made by a company representative in the course of the investigation on 17 October 2012, which were recorded in Annexure “B” and to Annexure “C”

(as evidence of a continuous presence of flammable gas that made shafts 11 and 11 C hazardous locations), the principal inspector

failed to notify the mine prior to making recommendations that these documents would also be considered when deciding whether or not to impose a fine. Similarly, it could not be gleaned from the inspector’s recommendation that these documents were considered relevant by him.

[10] It is obvious from the above that the mine could not have had an inkling that the principal inspector’s decision would rely heavily on documents it was not made aware would be taken into account and in the case of the record of the enquiry, it would never have had site of prior to it being provided as part of the record in the review proceedings. As a matter of logic, it is readily apparent that in making its own representations, the mine would not have been aware of the need to address the apparent implications of these other documents, even if some of them they could be obtained from their own records. On the face of it, what it needed to address was what was contained in the representations of the inspector and nothing more. It could hardly have been expected to

anticipate the need to address issues not canvassed in that recommendation, nor to deal with specific inculpatory evidence it had

not been apprised of beforehand. An employer wishing to defend itself against the imposition of administrative fines under the MHSA, the scale of which are not insignificant, should not be required to speculate on the case against it which it needs to answer.

- [11] Unsurprisingly, the principle has been emphasised by numerous authorities that the person making a decision that is potentially adverse to the subject of the decision whose conduct is being scrutinised in order to make the decision, needs to disclose to the subject in sufficient detail what aspects of its conduct are of concern so that the subject can make whatever representations in its defence which it deems necessary to answer those concerns. Amongst the judgements emphasising the principle, to mention a few, are: *Sokhela v MEC for Agriculture & Environmental Affairs*[2]; *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd*[3]; *Klein v Dainfern College*[4]; *Yuen v Minister of Home Affairs*[5], and *Tao Ying Metal Industry (Pty) Ltd v Poee & others*[6].
- [12] It was contended in the heads of argument submitted by the respondents, before they withdrew their opposition to the application that, the principal inspector must bring his own judgment to bear on the imposition of a fine and should not rubber stamp the decision of inspector contained in the recommendation and in doing so was entitled to use information from the in loco inspection which the applicant was part of. Of course, it is correct that the principal inspector must reach his own decision having considered the recommendations of the inspector and the employer's response. It may well be that there is other material he is entitled to consider, though I make no finding in this regard, but the mere fact that an employer might be aware of information that he ultimately relies on does not mean the employer will know in advance that such information will be used in his deliberations unless it receives notice that part of the case it has to answer is based on that material which should be clearly identified and, if not readily available, provided to it. It is important to bear in mind that a decision under s 55B of the MHSA is essentially an accusatory process, not a policy making deliberation as was the case in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*,[7] so there is arguably even less scope for the inclusion of other considerations in the decision making process which were not pertinently brought to the attention of the employer beforehand in this type of proceedings.
- [13] For the reasons above I am satisfied that a significant part of the justification for the administrative fine imposed by the principal inspector was based on material which the mine could not have been aware would have been taken into consideration by him in arriving at his decision and that in the circumstances, the decision was taken in breach of the right to a fair hearing under section 6 (2)(c) read with section 3(2)(b)(ii) of PAJA.
- [14] The applicant has asked for an order of costs against the respondents up until the date they withdrew their opposition. The respondents were cited in their official capacities but the Department of Mineral Affairs was not. This only came to my attention after argument in the matter. In the circumstances, I have decided to reserve the issue of an order of costs.

Order

- [15] The decision of the first respondent taken on or about 8 or 9 April 2013 to impose an administrative fine in the amount of R 1,000,000 (one million rands) on the applicant and communicated to the applicant on or about 12 April 2013 by email, which is attached to the founding affidavit as “MN1”, is reviewed and set aside.
- [16] The issue of costs is reserved and may be enrolled by either party for argument on written notice to the Registrar.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

A T Myburgh, SC instructed by Edward

Nathan Sonnenbergs Inc.

RESPONDENTS:

No appearance

- [1] Section 6(2)(c) of PAJA provides that “a court ... has the power to judicially review an administrative action if ...the action was procedurally unfair” and section 3 (2) (b) states that: “In order to give effect to the right to procedurally fair administrative action, and administrator, subject to subsection (4), must give a person referred to in subsection
- (1) - ... (ii) a reasonable opportunity to make representations;...”
- [2] (KZN) 2010 (5) SA 574 (KZP) at paras [52] to [55].
- [3]
- [2008] ZASCA 56; 2008
- (6) SA 220 (SCA) at 227-8 para [15].
- [4] 2006
- (3) SA 73 (T) at para [35].
- [5] 1998
- (1) SA 958 (C) at 966I-967D.
- [6] [2007] 7 BLLR 583 (SCA) at para [6].

[7] 2006

- (2) SA 311 (CC) at 381: “[153] Standards of fairness called for in respect of law-making by legislative administrative action are different to standards of fairness called for in cases involving adjudication or administrative decisions such as licensing enquiries and the like where individual interests are at stake and decisions affecting particular individuals have to be taken. An individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved. [154] When it comes to the making of regulations the context is different. Regulations affect the general public and that means that diverse and often conflicting interests have to be taken into account in deciding what the laws will be. The decision of the law-maker on how to resolve these conflicting interests is ultimately a question of policy.” (emphasis added)

[7] 2006

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(emphasis added)

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