

SOUTH AFRICA / JUDGMENT

National Union of Mine Workers obo Mataboge and Another v Commission for Conciliation, Mediation and Arbitration and Others (JR2137/17) [2021] ZALCJHB 389 (19 October 2021)

[2021] ZALCJHB 389

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JR2137/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2137/17

In the matter between:

NATIONAL
UNION OF MINE WORKERS OBO
EZEKIEL
MATABOGE & 1
OTHER Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION First
Respondent
COMMISSIONER
MAKOLE JACOB MOKGOSI Second
Respondent
SIBANYE
GOLD PROTECTION SERVICES
(A
DIVISION OF SIBANYE GOLD
LIMITED) Third
Respondent

Heard: 26
November 2020
Delivered: This
judgment was handed down electronically by circulation to the
parties' legal representatives through email. The date and time
for
hand-down is deemed to be 19 October 2021.

JUDGMENT

MAHOSI J

Introduction

- [1] This is an application brought by the applicant, National Union of Mine Workers (NUM) on behalf of its members (the employees), in terms of section 145 of the Labour Relations Act^[1] (LRA) to review and set aside the arbitration award dated 13 August 2017, issued by the second respondent (the commissioner) under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), under case number FSWK 2716-16.
- [2] The key question is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.

Material background

facts

- [3] The employees, Mr Mataboge and Mr Morake, were employed by the third respondent. Mr Mataboge was employed as a Security Guard from 03 July 2006 and Mr Morake was employed as a Security Officer from 14 February 1997.
- [4] The third respondent charged the employees with misconduct for allegedly failing to take the required steps after a metal detector they were using to conduct a search on employees activated and for allegedly allowing the employees to exit the plant without taking the required steps. Mr Morake was charged as follows:

'Charge 1 Gross neglect of duty and/or gross dereliction of duty, in that on 18 February 2016 during your shift at Metallurgical Plant 1 Plant Gate, Beatrix Operations, you failed to take the required steps after a metal detector you were using to conduct a search on a plant employee activated around his trouser and T-shirt lining on his back to indicate that there was a metal bearing item on such area.

Charge 2 Gross dishonesty and/or gross misconduct

In that on 18 February 2016 during your shift at Metallurgical Plant 1 Plant Gate, Beatrix Operations, you allowed a plant employee to exit the plant without taking the required action after a metal detector you were using to conduct a search on a plant employee activated around his trouser T-shirt lining on his back to indicate that there was a metal bearing item on such area and thereby creating a possible opportunity for him to remove gold concentrate without authority from the plant.’[2]

[5] Mr Mataboge was charged as follows:

‘Charge 1 Gross neglect of duty and/or gross dereliction of duty, in that on 12 March 2016 during your shift at Metallurgical Plant 1 Plant Gate, Beatrix Operations, you failed to take the required steps after a metal detector you were using to conduct a search on a plant employee activated on his body parts to indicate that there was/were a metal bearing item(s) on such parts.

Charge 2 Gross dishonesty and/or gross misconduct, in that on 12 March 2016 during your shift at Metallurgical Plant 1 Plant Gate, Beatrix Operations, you allowed a plant employee to exit the plant without taking the required action after a metal detector you were using to conduct a search on a plant employee activated on his body parts to indicate that there was/were

a metal bearing item(s) on such parts and thereby creating a possible opportunity for him to remove gold concentrate without authority from the stated plant.’[3]

[6] Consequently, the employees were subjected to disciplinary enquiry after which they were both found guilty on all the charges. The employees appealed, but both the sanction of guilty and dismissal were upheld.

[7] Aggrieved by the third respondent’s decision to dismiss the employees, NUM referred a dismissal dispute to the CCMA challenging both the substantive and procedural fairness of their dismissal. The dispute could not be resolved through conciliation and was referred to arbitration that was held on 15 and 16 March 2017, 21 June 2017 and 25 to 26 July 2017.

[8] On 13 August 2017, the commissioner issued an arbitration award in terms of which he found that the dismissal of the employees was procedurally and substantively fair. It is this arbitration award which is the subject of this matter.

Submissions and

analysis

[9] Although NUM took issue with the procedural findings of the commissioner in its founding affidavit, it submitted in its heads of arguments that it no longer took issue with it, but only took issue with the substantive findings. In this regard, NUM submitted that the commissioner’s findings on consistent application of discipline and the sanction were not reasonable, if one considers the evidence that was before him.

[10] The basis of this submission was that the third respondent was inconsistent in the application of discipline. In this regard, NUM argued that:

10.1 Selebalo who did not properly search an employee leaving high-risk area and from which gold bearing material was found, was transferred to another operation;

10.2 Thoabala and Nkoku who permitted a truck to exit without being searched were only given a final written warning;

10.3 Cebelekhulu who admitted to not searching a person leaving the plant was only given a final written warning valid for 12 months;

10.4 Maiee who allowed an employee to leave the lab without a search being done was given a written warning; and

10.5 Rankweteke who did not conduct a search at all was not disciplined.

[11] The third respondent submitted that the cases of the aforementioned employees were distinguishable from the employees' because in the case of Selebalo, the video footage showed that the metal detector activated only once after which Selebalo ran the metal detector back over the same spot and it did not activate again. According to the third respondent, Selebalo conducted the search as per the procedure.[4]

[12] It was the third respondent's evidence that Nkofu and Thoabela were found guilty of neglect of duty and given a final written warning valid for 12 months because the truck which they had not searched was escorted by officer Letola, a member of the Protection Services, whilst inside plant premises; the truck driver did not make any contact with the plant employees; they showed remorse and they were not charged with gross dishonesty.

[13] Further that Cebekhulu was given a sanction of a final written warning valid for 12 months for neglect of duty in that he allowed a driver of a vehicle to exit the plant without conducting a search. No disciplinary charges were brought against Rakwetete because it was a mere allegation that he did not escort people carrying gold bearing material whilst on duty. Maiee was issued with a final written warning valid for 12 months for gross negligence after he allowed an employee who was still on duty to leave the lab without being searched, because he was not charged with gross dishonesty.

[14] Having assessed the above evidence, the commissioner correctly made a finding that the cases of Selebalo, Nkofu, Thoabala, Cebekhulu, Maiee and Rankweteke were distinguishable from that of the employees. There is therefore no merit to this ground.

[15] It was NUM's further submission that the commissioner's findings that no search was conducted and that the trust relationship was broken because of the misconduct was not supported by any evidence, alternatively was unreasonable. According to NUM, there was no dispute as to whether there was a search conducted. The only issue on this aspect, so it was argued, was whether a proper search was conducted. There is no merit to this ground.

[16] The third respondent correctly submitted that to an extent that the employees were charged with the failure to take the required steps to conduct a search on the employee after the metal detector activated on that employee's body parts, the commissioner was required to consider and determine whether the employees had conducted a search in line with the policy.

[17] Further that the commissioner's finding that a number of activations of the metal detector as well as the total time it took for the searches amounted to no search at all was reasonable, inter alia, because:

17.1 The employees were provided with metal detectors to help them to conduct searches and prevent possible theft of gold bearing material and the video footage showed that in respect of Morake, the metal detector activated on 6 occasions and in respect of Mataboge the metal detector activated on 17 occasions; and

17.2 They both supposedly conducted a physical search on the employees in question, but the alleged search only lasted less than a minute when it ought to have taken longer than in mere minute.

[18] Taking into account the evidence before the commissioner, his finding that the search conducted by the employees amounted to no search at all was reasonable. There is therefore no merit to this ground.

[19] On the issue whether evidence was led to show that the trust relationship was broken down, the third respondent referred the Court to the judgment in *Woolworths (Pty) Ltd v Mabija and others*[5], where the Labour Appeal Court stated that:

'The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonestly, cannot be visited with dismissal without any evidence as to the impact of the misconduct. In some cases, the outstandingly bad conduct of the employee would warrant an inference that the trust relationship has been destroyed. It is however always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair. The Commissioner in this case considered this aspect.'

[20] In the current matter, when assessing the appropriateness of the the sanction, the commissioner took into account, inter alia, the importance of the rule, the impact of its breach on the survival of the first respondent's future operations, the importance of the employees' positions and the fact that they were also charged and found guilty of gross dishonesty to arrive at the finding that they breached their duty of trust towards the third respondent. As a result, the commissioner found that the dismissal was, under the circumstances, fair and justified. There is, therefore, no irregularity in how the commissioner assessed the appropriateness of the sanction.

[21] Considering the above, it is apparent that NUM has not established any basis upon which the Court could find that the award was reviewable. As such, it failed to discharge the onus of establishing that the commissioner committed misconduct in relation to his duties, a gross irregularity in the conduct of the arbitration proceedings, or exceeded his powers. As aforesaid, the commissioner considered all the evidence before him and applied his mind to the issues raised by the parties. It cannot be said that he reached a decision that a reasonable decision-maker could not reach. There is, therefore, no reason for this Court to interfere with the award.

Costs

[22] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[23] Accordingly, the following order is made:

Order

1. The application for an order to review and set aside the arbitration award dated 13 August 2017, issued by the second respondent under the auspices of the first respondent under case number FSWK2716-16 is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate

Dries Diamond

Instructed by: Solomon

Holmes Attorneys

For the third respondent: Mr Mohale of Mohale Incorporated Attorneys

[1] Act 66 of 1995 as amended.

[2] Index to bundle of documents, p67

[3] Index to bundle of documents, p154

[4] Arbitration award at para 84.

[5]

(2016) 37 ILJ 1380 (LAC).

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Prepared on 14 October 2026 · Esheria