

SOUTH AFRICA / JUDGMENT

Sibanye Stillwater ta Sibanye Gold Ltd v CCMA and Others (JR2771/21) [2024] ZALCJHB 369 (27 September 2024) [2024] ZALCJHB 369

COURT

Labour Court Johannesburg

BEFORE

Molotsi

CASE / FILE NUMBER

JR2771/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

case

no: JR2771/21

In

the matter between:

SIBANYE
STILLWATER T/A
SIBANYE
GOLD LTD
Applicant
and
CCMA
First
Respondent
THEMBILE
MDALI, N.O.
Second
Respondent
NUM
OBO MEKUTO DUMALISILE
Third
Respondent

Heard:

2 May 2024

Delivered:

27 September 2024

JUDGMENT

MOLOTSI, AJ

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act[1] (LRA). The second respondent (the commissioner) issued the arbitration award on 15 November 2021. In the arbitration award, the commissioner made a finding that the dismissal of the third respondent, Mekuto Dumalisile (the employee), by the applicant, Sibanye Stillwater t/a Sibanye Gold Ltd, was substantively unfair.
- [2] The commissioner ordered the applicant to retrospectively reinstate the employee on the same terms and conditions that governed his employment relationship prior to his dismissal on 12 May 2021. The reinstatement was accompanied with an order of back pay to the employee.
- [3] The applicant received the arbitration award on 15 November 2021. The applicant launched the review application on 3 January
2022. The review application was launched within the six weeks from the date on which the applicant received the arbitration award. In the review application, the applicant sought the reviewing and setting aside of the arbitration award and substituting the award with a finding that the dismissal of the employee was fair. Alternatively, the applicant sought the remittal of the arbitration to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), to be heard de novo before another commissioner other than the second respondent.

The relevant facts

- [4] The employee was employed by the applicant on or about 23 September 2005 and worked as a winch operator. The applicant is one of the world's top - tier gold producers. Sibanye Protection Services is responsible for inter alia searching mine employees, observing the stopes and crosscuts and keeping a look- out for illegal mining.
- [5] On 10 March 2021, a group of security officers were deployed underground at Sibanye's Thuthukani Shaft 1. The security officers noticed a group of mine employees busy accumulating Gold Bearing Material (GBM). The mine employees were using bathroom carpets to accumulate the GBM.
- [6] The mine employees were wearing their company distinctive PPE clothing. When the mine employees were busy washing the GBM, they had their lights turned on. The security officers had their lights turned off and it was therefore easy for the security officers to identify the mine employees involved. The security officers observed the mine employees for approximately five minutes whilst they were busy washing the GBM.

- [7] The employee was one of the mine employees observed by the security officers washing the GBM. The winch, which was supposed to be operated by the employee, was not operational at the time the employee was busy washing the GBM.
- [8] The security officers switched on their lights and the mine employees, which included the employee, noticed the security officers. The mine employees started running away. The employee and Mr Maheme were arrested at the tip area.
- [9] The employee was charged with the following charge(s):

‘Gross misconduct in that on or about the 10th of March 2021 whilst at Kloof 1 Shaft underground, you were seen by members of the Sibanye Protection Services underground team busy processing Gold Bearing Material using a Jameson table.

Alternatively

Deliberate or negligent failure to comply with company policies, management, instructions, briefs on or about the 10th of March 2021 whilst at Kloof 1 shaft underground you have allegedly seen prohibited and/or unauthorised processing of gold bearing material by mine employees and failed to report such illegal activities to management.’

- [10] The employee’s disciplinary hearing took place on 26 April 2021. The employee was dismissed on 12 May 2021.
- [11] The employee assisted by his trade union, NUM, referred an unfair dismissal dispute to the CCMA on 21 June 2021. The referral was not accompanied with a condonation application. The dispute was set down for a Con/Arb hearing on 12 July 2021. The certificate of outcome was issued on 26 July 2021 indicating that the dispute remains unresolved and that the dispute may be referred to arbitration, which was held on 3 September 2021.
- [12] The employee was the sole witness during the arbitration proceedings. He testified that on 10 March 2021, whilst operating a winch at about 13h45, he saw lights coming towards his direction and saw men running to the gully towards the winch. He switched off the winch so that he could not endanger the men. He denied that he was busy processing the GBM using the bathroom carpets on the Jameson table. He was arrested by the security officers at the winch and his rescue pack was taken off from him by the security officer, Mr Zibi, when he was about to start the winch after he noticed that the people who came running towards the winch had gone.
- [13] The applicant led the evidence of two witnesses namely Mr Zibi and Mr Moima. They are both security officers. Mr Zibi testified that on 10 March 2021 he was deployed to work underground at Thuthukani Shaft 1. He was in the company of other security officers. They went to the stope. They noticed ten mine employees wearing PPE clothing were busy accumulating the GBM using bathroom carpets.

- [15] The mine employees' lights were on and the security team had switched off their lights. The security team observed the mine employees for approximately five minutes. The security team then turned on their lights and the mine employees started to run away. They chased the mine employees and arrested two of the employees.
- [16] The two employees arrested were the employee and Mr Maheme. They were arrested with their carpets on the tip and their rescue packs were down. Mr Moima's evidence corroborated the evidence of Mr Zibi. Mr Moima was present on 10 March 2021 and he formed part of the security team deployed underground at Thuthukani Shaft 1.

The arbitration award

- [17] In dealing with the main charge of processing the Gold Bearing Material using a jameson table, the commissioner at paragraph 40 of the award stated :

'The place where the Applicant was arrested and the issue whether the item(s) allegedly used in committing the illegal activity were found on Applicant or not, will be the determining factor/s whether the Applicant was involved in the unauthorised processing of GBM.'

- [18] At paragraphs 43 to 48 of the arbitration award the commissioner stated the following in dealing with the main charge:

'[43] Under these contending versions i find it improbably that the Applicant was arrested at the tip next to the tip with the bathroom carpet next to him for the following reasons:

- [44] Albeit the witnesses testified that the Applicant was arrested together with Mr Maheme with bathroom carpets which were used to illegally process the GBM next to them and their rescue packs down, on page 31 of the Respondent's bundle there is only a picture of Mr Maheme with bathroom carpet he allegedly used to illegally process the GBM.
- [45] The witnesses could not explain why Mr Maheme's photo showing him doing illegal activity was singled out from the Applicant and Mr Maheme were arrested simultaneously at the same place where illegal activity was committed. I understand that the witnesses were not responsible for taking photos but it does not make sense why the photographer would, in a situation where two suspects were caught red handed at the scene of crime, only take a photo of one suspect and leave the other.
- [46] The places where the pictures of the Applicant appear on pages 27 (which is a waiting place and 30 (which is also a waiting place according to witnesses's version, but it is the security's office according to the Applicant) are not places where the illegal activity was committed and such these photos do not demonstrate the commission of unauthorised processing of the GBM by the Applicant. Furthermore, neither any of the photos demonstrate the place where the Applicant was arrested and nor any of the photos display that the Applicant's rescue pack was down when he was arrested by the security.

[48] In the absence of photographic records indicating the Applicant's involvement in the act of illegally processing the GBM, I find the Applicant not guilty of this charge.'

[19] In respect of the alternative charge, the commissioner made the following findings at paragraphs 49 to 52:

'[49] The Respondent led evidence on page 22 of the Respondent's bundle only to the extent of proving the existence of policy regarding 'looking the other way when illegal mining activities are committed and not reporting suspicious conduct by employees or other persons.

[50] Albeit the Applicant conceded that if employees are working at the tip he is aware of them, he denied when put to him that he was aware about what was done by the group of people at the tip on the 10th March 201. He said he only saw those people when they came running towards the gully and he was not aware that there were security officers among the people who were running. This was the only part of the version put to the Applicant almost relating to the alternative charge.

[51] No evidence was led by the Respondent which suggest that the Applicant had seen the commission of the illegal activity at the tip but failed to report it to the management. The more emphasis was that the Applicant had actively participated in unauthorised processing of the GBM.

[52] I therefore find the Applicant not guilty of alternative charge since no evidence was led by the Respondent regarding breach of policy by the Applicant in relation to report the commission of illegal activity in the mine.'

Grounds for review

[20] The applicant's first ground for review was that the CCMA lacked jurisdiction to entertain the employee's unfair dismissal dispute. The employee was dismissed on 12 May 2021. The employee referred his unfair dismissal dispute to the CCMA on 21 June 2021. The dispute was referred outside the 30- day period in terms of section 191(1)(b)(i) of the Act.

[21] The commissioner failed to appreciate the distinction that there is no requirement for photos to be taken and any photographs would be corroboratory in nature. The commissioner committed a gross irregularity in that he placed too much emphasis on the photographic

evidence (or lack thereof) during the arbitration proceedings.

[22] The commissioner committed a material error of law because he misconceived the law of evidence and/or he failed to apply;

alternatively, to properly apply his mind to direct and circumstantial evidence in addition to the photographic evidence presented by Sibanye. The direct and circumstantial evidence which the commissioner failed to properly consider is the following:

[22.1] Both security officers who testified on behalf of Sibanye were eyewitnesses. In fact, it was the first witness, Mr Zibi who apprehended the respondent and thus gave a first- hand account of what transpired on the day in question;

[22.2] Both witnesses testified that they were sitting about ten meters away from where the employees, including the respondent, were processing the GBM.

[23] The commissioner required evidence in the form of photographs only to satisfy the applicant's onus. The commissioner misconceived the law of evidence. It is trite that evidence may be presented in different formats with the same probative value. The commissioner did not appreciate this and he committed a material error of law and /or a gross irregularity.

The submissions by the parties

[24] Mr Moll on behalf of the applicant submitted the CCMA did not have jurisdiction to arbitrate the dispute as the referral was referred late and there was no condonation application. On this ground alone, the award must be reviewed and set aside.

[25] Mr Moll further submitted that the commissioner expected that the photographs produced by the applicant during the arbitration, will show the employee committing the act of misconduct. Mr Zibi and Mr Moima's evidence corroborated each other. The evidence of Mr Zibi and Mr Moima was ignored by the commissioner.

[26] The transcripts of the record[2] reflects that Mr Zibi testified that one could not take photos underground as it was dark. Furthermore, Mr Zibi testified that Mr Mekuto (employee) was present[3]. Mr Moll referred to the evidence of Mr Zibi when he testified that they did not take the photo of the employee when he was accumulating

because he (employee) was at a distance[4].

[27] Mr Moll submitted that the commissioner did not bother with the rest of the evidence of the applicant. The commissioner failed to understand the purpose of the photographs. The primary evidence of the applicant was the evidence of the two security officers[5]. This constituted direct evidence tendered by the applicant

[28] Mr Mashabela on behalf of the employee submitted the issue of the late referral of the dispute was not one of the issues which were narrowed down by the commissioner and the parties. The issue of the late referral was not raised during the arbitration proceedings. Mr Mashabela, however, conceded that the referral to the CCMA was late.

[29] The employee did not participate in the misconduct. The employee switched off the winch when he saw people running towards him in order to ensure that he did not endanger their lives. The commissioner focused on the photographs because Mr Zibi testified that one of his colleagues had a camera with him.

[30] It was unlikely that the security officers could sit in the dark for plus minus ten minutes and be able to observe and identify the people involved in the misconduct. The employee was not found in possession of any item which linked him to the misconduct. The photographs were taken at the waiting area and not underground. It is improbable that Mr Maheme was arrested together with the applicant.

Evaluation

[31] In the review application, this Court is required to ascertain whether the commissioner considered the principal issues before him/her, evaluated the facts presented at the hearing, and came to a reasonable conclusion[6]. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[7], the Supreme Court of Appeal (SCA) held that:

‘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 section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 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 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.’

[32] The result of the arbitration award will however be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator[8].

[33] The first attack on the arbitration award was that the CCMA did not have jurisdiction to arbitrate the dispute as the referral was late. It was common cause that the applicant was 12 May 2021. The employee referred unfair dismissal dispute to the CCMA on 21 June 2021. The referral was not accompanied with a condonation application. The employee did not apply for condonation for the late referral of the dispute.

[34] It is a trite principle that the CCMA cannot decide its own jurisdiction. In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and others*[9], the Labour Appeal Court (LAC) held that:

‘[39] The issue that was before the commissioner was whether there has been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.

[35] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[10], the LAC stated:

‘[101] Nothing said in *Sidumo* mean that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA’s arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise.’

[36] On the objective facts, the CCMA did not have jurisdiction to arbitrate the employee’s dispute. The referral to the CCMA was late and there was no condonation application made by the employee. The commissioner did not have jurisdiction to arbitrate the dispute.

[37] Consequently, the attack on the award regarding lack of jurisdiction must prevail. This ground of review is enough to vitiate the entire arbitration award. The arbitration award is therefore reviewed and set aside on this ground alone.

[38] The other grounds for review related to the manner in which the commissioner dealt with the evidence. The commissioner failed to resolve the factual dispute between the parties. The factual dispute was whether the employee committed the misconduct or not. Instead, the commissioner’s focus was on the photographs taken by the applicant and he completely ignored the viva voce evidence of the applicant’s witnesses.

[39] The commissioner’s focus on the photographs was totally misplaced and resulted in an unreasonable arbitration award. The commissioner failed to properly apply his mind to all the material evidence before him and this constituted gross irregularity and rendered the arbitration award unreasonable.

[40] The commissioner ignored the following evidence of the applicant’s witnesses: (a) The security officers observed the employee together with other mine employees accumulating GBM using bathroom carpets;

(b) the employee together with the other mine employees had their lights switched on and the security officers had their lights turned off. The security officers could therefore easily identify the employee accumulating the GBM; (c) the mine employees including the employee were wearing PPE clothing;

(d) the winch which was supposed to be operated by the employee at that time was switched off, (e) the employee including other mine employees started running away when the security officers switched on their lights, (f) the employee and Mr Maheme were arrested and when the employee was arrested his carpet was next to him.

[41] The finding made by the commissioner that the photographs do not demonstrate the commission of unauthorised possession of the GBM by the employee, illustrate that the commissioner misconceived the nature of the inquiry and failed to properly apply his mind to the material evidence before him. As it was correctly submitted by Mr Moll, the photographs were meant to corroborate the evidence of the security officers. There was no requirement at the workplace that photographs has to be produced which shows the employee in the act of committing the misconduct. The direct evidence showing the employee involvement in the misconduct came from the security officers who observed the employee committing the misconduct. As per the evidence of Mr Zibi under cross examination, there is no photograph of the employee accumulating the GBM[11]. Furthermore, Mr Zibi testified under cross examination, that they did not take photographs of the employee accumulating GBM because they were at a distance[12].

[42] The photographs were not taken underground at the time when the commission of the misconduct took place. The evidence of Mr Zibi, which was simple and clear, was that they could not take photographs underground as it was dark. It is not clear why this evidence of Mr Zibi was disregarded by the commissioner.

[43] It was unreasonable on the part of the commissioner to have expected the applicant to produce photographs showing the employee committing the act of misconduct. It was further unreasonable on the part of the commissioner to have expected the applicant to produce photographs where the employee was appearing in the same photo with Mr Maheme. No reasonable decision maker could arrive at this findings in *Mosephi and Others v R*[13] the Court held:

‘The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all other available evidence.’

[44] The commissioner failed to appreciate the purpose for which the photographs were tendered as evidence in the arbitration. This failure influenced the outcome of the arbitration award. Photographs constitute real evidence. The efficacy of photographs tendered as evidence, was based on the evidence tendered by the security officers. As per Mr Zibi’s evidence under cross examination, the purpose of taking photographs at the waiting place/area was to emphasize that they identified the mine employees who have been arrested[14] and furthermore the photographs showed that the mine employees were having their bathroom carpets at the working place[15].

- [45] The assessment of evidence (or lack thereof) by the commissioner is obvious in the arbitration award. The assessment of evidence by the commissioner was incorrectly linked to photographs tendered by the applicant to the exclusion of the viva voce evidence tendered by the security officers. This constituted gross irregularity on the part of the commissioner. The arbitration award must be therefore be reviewed and set aside.
- [46] The commissioner's finding that there was no evidence led by the applicant which suggests that the employee had seen the commission of the illegal activity at the tip but failed to report it to management, ignores the evidence of Mr Zibi. Mr Zibi referred to combating illegal mining policy, which refers to example of collusion, as looking the other way when illegal mining activities are being committed and not reporting suspicious conduct by employees or other persons[16]. This is another example of the commissioner failing to have regard to the material evidence which was placed before him and rendering the arbitration award unreasonable.
- [47] Based on the above, the commissioner's arbitration award falls outside the band of reasonableness. The arbitration award of the commissioner was disconnected with the evidence at arbitration.
- [48] There is enough material before this Court to determine the appropriate sanction. The evidence of the security officers who testified during the arbitration proceedings was credible and satisfactory.
- [49] The security officers observed the employee together with other mine employees accumulating the GBM. The mine employees were observed as they were wearing their PPE and they had their lights on (cap lights). Furthermore, when the employee was underground, he was not wearing a mask. When the security officers switched on their lights, the employee together with other mine employees noticed the security officers and started running away.
- [50] The employee was arrested by Mr Zibi. When the employee was arrested he had his rescue pack down. There was no reason on the part of the security officers to falsely implicate the employee in the wrongdoing. Mr Zibi did not know the employee prior 10 March 2021. The employee under cross examination stated he did not know or have any issues with the two security officers who testified at arbitration[17].
- [51] The evidence of the employee that when he saw people running towards him he switched off the winch was not satisfactory. This is so because when the security officers arrived underground, they observed the employee together with other mine employees for approximately five minutes accumulating GBM and the employee was not operating the winch at that time.
- [52] The employee was not operating the winch as he was busy with other mine employees accumulating the GBM. If the winch was operational at the time when the employee was observed by the security officers, no one was supposed to have been in the gully and the tip

as they could have been endangered by the winch. Furthermore, under cross examination, the employee admitted that if people are busy working at the tip he would be aware of them[18]. This presupposes that the evidence of Mr Zibi that the employee was not operating the winch at the time when they were accumulating the GBM was probable and satisfactory evidence.

[53] To simply conclude that the employee switched off the winch when people started running towards him is not supported by the totality of evidence in the arbitration. As Mr Zibi testified[19], when they arrived underground, the winch was not operated and it was impossible for the employee to say he was operating the winch while people were busy washing the GBM at the tip. Mr Zibi further testified that when he arrested the employee, the employee stated

that he knows nothing as he was driving the winch[20]. One cannot drive a winch when people are at the gully. The employee's evidence during the arbitration was contradictory and unreliable.

[54] To illustrate the improbability of the employee's evidence, the following exchange took place under cross examination between the employee and the applicant's representative in arbitration:

'Respondent Rep: Now, on that day security says that you together with other employees you were at the tip busy washing gold on a jameson table with carpets

Interpreter (the employee): It is not true, it was Maheme who was breaking the rocks. The people that, these other people came with them, came being chased by them, by the security and Maheme also ran[21]"

[55] The above exchange shows the employee could not have been using the winch when Mr Maheme was busy breaking the rocks. As per his

evidence, no one is supposed to be in the gully when the winch is operated as it could endanger their lives. Furthermore, Mr Maheme was part of the employee's crew on 10 March 2021. If the employee and Mr Maheme were not accumulating GBMs why did they run away when the security officers switched on their lights.

[56] During the arbitration proceedings, the employee under examination in chief admitted that he was in one of the photographs and the photo was taken at the security office. This then begs the question, why was the employee photo taken at the security office if he was not arrested for accumulating the GBM. The version of the employee at arbitration was far-fetched, unreliable and improbable and ought to have been rejected by the commissioner.

[57] As per the applicant's disciplinary code list of dismissible offences, there is what is called "mining related offences" and being in unauthorised possession of gold bearing material, constitutes a dismissible offence.

[58] The applicant was able to prove that the employee committed the misconduct. The employee was dismissed for a serious misconduct which is a dismissible offence in terms of the disciplinary code of the applicant. The existence of the rule was known by the employee. The employee breached the rule. The conduct of the employee rendered the employment relationship intolerable. The dismissal of the employee was an appropriate sanction. Dismissal was an adequate response to risk management.

[59] In the premises, the following order is made:

Order

1. The arbitration award issued by the second respondent on 15 November 2021 under case no: GAJB12211-21 is hereby reviewed and set aside.
2. The dismissal of the employee was substantively fair.
3. There is no order as to costs.

H. Molotsi

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Instructed by: Mr P Moll SolomonHolmes Attorneys Inc For the Respondent: Instructed by: Mr R Mashabela Mashabela Attorneys Inc

[1] Act 66 of 1995 as amended

[2] Volume 1 page 38 lines 24- 26

[3] Volume 1 page 40 lines 21 - 22

[4] Volume 1 page 45 lines 4- 10

[5] Volume 1 page 18 lines 22- 26., Volume 1 page 34 lines 22-23, Page 46 lines 18- 24

[6] See: Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at para 16.

[7]

[2013] 11 BLLR 1074 (SCA) at para 25.

[8] See: Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate

(2015) 36 ILJ 968 (LAC) at paras 12-13.

[9]

(2008) 29 ILJ 2218 (LAC) at paras 39 – 40.

[10]

(2008) 29 ILJ 964 (LAC) at para 101.

[11] Volume 1 page 31 lines 4-10 and lines 23- 26 on page 31 (Volume 1)

[12] Volume 1 page 45 lines 5- 10

[13] 1980 - 1984 LAC 57 at 59F- H.

[14] Volume 1 page 29 lines 8-9

[15] Volume 1 page 30 line 18- 19

[16] Volume 1 pages 23- 24

[17] Volume 1 page 85 lines 1 - 4.

[18] Volume 1 page 87 7 lines 8 - 12

[19] Volume 1 page 17 lines 20 24

[20] Volume 1 page 18 lines 1- 5

[21] Volume 1 page 87 lines 13 - 19

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Prepared on 13 October 2026 · Esheria