

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

2006-02-28

CASE NO: JR939/03

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In the matter between

ROBERT RAWU

Applicant

10 and

ANGLO GOLD FREE STATE

Respondent

EX TEMPORE J U D G M E N T

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REVELAS J

[1] This is an application for the review of an award made by a
20 commissioner sitting under the auspices of the Commission for
Conciliation, Mediation and Arbitration (“the CCMA”). The
commissioner is Mr Lekale who has not been cited as a party in
these proceedings. The arbitration hearing took place in Welkom
on 19 March 2002 after Mr Rawu, the applicant, had referred a
25 dispute about an unfair dismissal to the CCMA. There the matter
was eventually arbitrated by Mr Lekale, who made an arbitration
award on 26 March 2002 wherein he found that the dismissal of
the applicant was both substantively and procedurally fair. It is
this award that the applicant now seeks to set aside on review.

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[2] The applicant was charged with breaching the respondent's (the mine's) rules regarding spillage in trenches and sumps, and the inference drawn by the mine was that the applicant had removed certain gold bearing material from a pipe. Evidence hereon was led orally at the arbitration hearing, and there was also a video recording apparently showing the applicant conducting himself in a manner which supports the view that he, and two other employees, were involved in a scheme to remove such material.

[3] The applicant believes that the arbitrator did not apply his mind to the evidence which was presented to him. Mr Rawu was assisted by his trade union when he referred the dispute about his alleged unfair dismissal to the CCMA on 28 September 2001. The incident which led to the applicant's dismissal took place on 11 and 14 June 2001 respectively. The video tapes, according to the respondent linked the applicant to illegal activities that took place. The applicant did not place the video recording before me as part of the record in his application to review the conclusions of the arbitrator.

[4] Mr Prinsloo, the first witness, was employed as a security officer, and served as a co-ordinator of the investigation unit of the mine's metallurgy department. His work entailed the detection and investigation of theft of gold amongst other things. He gave evidence that during June 2001 he received information from an undisclosed source about the theft or illegal handling or removal of gold from a pump at the crusher section of the Free State No. 2 gold plant. The information disclosed that gold material was removed from the pipe in a certain area of the plant. A camera was then installed and concealed in that area to monitor and

record the covert activities over 24 hours. Mr Prinsloo said he received the video tapes and the people involved were identified and the applicant in question was one of the employees identified. During August 2001 all three (including the applicant) were dismissed.

[5] On 11 June the video recording reflected that the applicant was filmed whilst he was looking down into the sump area where two people had entered without authority. One was called Petrus Mofokeng and he was standing guard at the entrance or exit of the sump area when the applicant had arrived and looked down into the area. The applicant then left the area and then, after some time the two other employees departed from the area with a bag containing gold-bearing material. The incident of 14 June 2001 occurred when the applicant arrived at the sump area whilst two other employees were already in the area. The applicant allegedly looked down into the area and stood in front of the very pipe from which, according to the information received, the gold-bearing material was being removed. As a section supervisor, the applicant was showing a new foreman around the area when these incidents occurred. Therefore it was accepted that he knew about the illegal activities and was aware of the people inside the sump area at all material times. Mr Prinsloo said he came to the conclusion that the applicant was in fact involved and therefore he was charged and subsequently dismissed.

[6] At the arbitration hearing, the applicant admitted that he was the person shown on the video in respect of the incidents which occurred on 11 and 14 June 2001 respectively. He denied that he ever spoke to Mr Mofokeng when he got into the sump area, and

he has denied any knowledge of the two employees in question who were involved in illegal activities.

[7] The arbitrator listened to arguments on both sides and concluded that it was clear from the video recordings that the applicant had indeed spoken to Mr Mofokeng and the video recordings were further clear enough to enable the applicant to identify himself thereon even though there was poor lighting. Regarding 14 June 2001, the video could not have captured the activities so vividly that the applicant could have identified himself. The arbitrator held that the dismissal was procedurally fair as it was not proved that there was any unfairness in so far as the appeal hearing was concerned and there was only one dismissal and that took place on 4 September and not on the date of the appeal hearing.

[8] The arbitrator took into account the following facts which were common cause at the arbitration hearing:

1. That illegal activities involving theft or the unauthorised removal of gold-bearing material took place on 11 and 14 June 2001.
2. That the applicant had arrived at the relevant area whilst the perpetrators of the said misconduct were still inside the area in question.
3. In terms of the applicable procedures the employees in question had no authority or good reason to be in the area.
4. The employees entered the area before the applicant had

arrived and further left it after he had arrived.

5. The illegal activities concerned warranted dismissal if they were proved

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Then the arbitrator put what was in dispute and it was:

- a. whether or not the employees spoke to Mofokeng; and
- b. whether or not the applicant was aware and in fact took part in these activities.

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[9] The arbitrator held that on a balance of probabilities the applicant spoke to Mofokeng when he arrived at the scene because it was highly unlikely that he would ignore Mr Mofokeng, who was equally responsible for the area in question when they suspected there was something wrong in the area. He also found that the applicant's evidence was not credible and it was illogical.

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[10] The arbitrator analysed the probabilities and he found that the witnesses of the mine made a good impression on him and did not contradict themselves as their evidence was credible.

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[11] He once again made mention of the employee not being a credible witness and described him as evasive and unreliable. He also found that in the circumstances dismissal was the appropriate sanction as the economy of the Lejweleputswa Municipal District is dependent largely on the gold mining industry. He also made mention of the fact that the theft involved dishonesty and went to the root of the employer and employee relationship.

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[12] In essence, the arbitrator had made a credibility finding. The Labour Court and any other court of appeal or review, should be very loath to interfere with the credibility findings of an arbitrator, a judge, or a magistrate, in circumstances where they heard evidence, were steeped in the atmosphere of the proceeding and had ample opportunity to observe the witnesses.

[13] The applicant has not put any facts before me to convince me to interfere in his appeal. In fact, what the applicant seeks me to do is to give him a second chance as he does not like the consequences of the arbitration hearing. He was a man who earned R4 000, 00 a month and he is now probably unemployed, so one has some sympathy. However, the sanction that was imposed is the appropriate sanction for this kind of misconduct and, furthermore, the evidence before the arbitrator was properly taken into account. Before a court can interfere in any arbitration award, it must find that the arbitrator came to a conclusion which is not rationally connected to the facts before him or her. In this matter there is absolutely no indication that this was the case and in the circumstances the application is dismissed.

Judge Elna Revelas
Judge of the Labour Court