

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR113/06

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

SEFAKO J

Second Applicant

and

COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION

First Respondent

MANZANA D N.O.

Second Respondent

HARMONY GOLD MINING CO LTD

Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. The first applicant, the National Union of Mineworkers (NUM) on behalf of its member, J Sefako the second applicant, brought an application to review an arbitration award made by the second respondent (the commissioner) after she had found that the second applicant's dismissal was procedurally and substantively fair.
2. The application was opposed by the third respondent, Harmony Gold Mining Company Limited.

The background facts

3. The second applicant was employed by the third respondent as a general worker. He was

charged with threatening violence and intimidation. He is alleged to have shouted and incited the Sothos to fight the Xhosas after the hostel prefect, Banya, had assaulted a person at the third respondent's premises who had no permission to be there. The second applicant was found guilty of both acts of misconduct and was dismissed. His appeal was unsuccessful. He referred a dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and arbitration.

4. Several witnesses testified at the arbitration proceedings. The applicants raised the issue of lack of consistency at the proceedings. The commissioner issued an arbitration award and found that the second applicant's dismissal was both procedurally and substantively fair.
5. The applicants felt aggrieved with the award and brought the review application.

The grounds of review

6. The applicants are not challenging the commissioner's finding that the second applicant's dismissal was procedurally fair. They have also not challenged the guilty finding on the two acts of misconduct but have limited their challenge to a single issue namely the manner in which the commissioner approached and dealt with the issue of consistency.
7. The applicants had argued before the commissioner that the sanction of dismissal was unfair as it had been inconsistently applied because Banya, the security officer (hostel prefect) who had carried out the initial assault had not been dismissed. The commissioner was aware of the argument and understood that had the sanction of

dismissal been imposed in an inconsistent manner, that the dismissal would have been substantively unfair. She dealt with this argument and said that she could not find that the sanction of dismissal had been inconsistently applied in that the second applicant and Banya had been found guilty of different offences, i.e. incitement to violence on the one hand and assault on the other. The applicants contended that while acknowledging that the argument about inconsistency generally only applies to the same or similar offences that when the misconduct for which a person is dismissed is less serious than, or a precursor to, a second misconduct for which the guilty party is not dismissed, then the sanction of dismissal has been imposed inconsistently and unfairly. The commissioner's reasoning constituted a material error of law and consequently is misconduct in relation to her duties as an arbitrator and is also a gross irregularity in the conduct of the arbitration proceedings.

Analysis of the facts and arguments raised

8. It is common cause between the parties that the transcript of the arbitration proceedings is extremely bad. The parties met with the commissioner who then had her notes transcribed. There is not a full transcript of the arbitration proceedings. The applicants do not take issue with the commissioner's recordal of the evidence in her award.

9. It is not necessary to deal fully with the evidence led at the arbitration proceedings. The third respondent called three witnesses and the applicants five witnesses including the second applicant. All three witnesses called by the third respondent testified about the incident that led to the second applicant being charged with misconduct. This is recorded in the award and the transcribed handwritten notes of the commissioner. All three

witnesses testified about one Shiya. He had also asked why Xhosas assaulted Sothos and said in the presence of the second applicant that the Sothos must assault the Xhosas. Shiya had told the second applicant that the injured person was assaulted by a Xhosa police and the Xhosas had been assaulting Sothos for a long time and asked why the Sothos do not fight. This was reported to the meeting that the second applicant and Shiya were enticing people to fight. The matter was reported to the seniors and it was decided that action should be taken, against Banya, the second applicant and Shiya. They were charged.

10. It is not entirely clear whether any action was taken against Shiya and if so what and what the outcome was. The commissioner had recorded in her award that at no stage did the first applicant argue about what had happened to Shiya who was alleged to have also been involved in inciting people. This is contrary to what the commissioner had recorded when she summarised the first applicant's arguments.
11. The commissioner recorded the applicants' arguments as follows in her award:
"The union argued that the Employers witnesses testified that Mr Shiya had a gun but no action was taken against him for carrying a personal gun on the premises. They argued that the Employers witness Mziwethemba failed to report the allegation to the relevant people as the incident was fabricated. They argued that Litha did not testify at the hearing and did not report the matter to the relevant people. They argued that none of the employer's witnesses reported the incident. They challenged Mr Sefako's evidence as the applicant worked night duty and could not have been at the meeting as alleged. They argued that the Hostel manager did not take action based on hearsay but were forced by

Mr Mayixhale. They argued that the Company took days before taking action and failed to suspend the applicant whilst they alleged that they viewed the matter in a serious matter. They challenged the fairness of the dismissal as the Security who was the assaulter was not dismissed whilst the Company viewed assault in a serious manner. They further argued that the applicant argued his case through four witnesses who corroborated the applicants evidence and the Security confirmed that if the applicant had actually incited violence then the matter would have been reported to them but that was not done as the story was fabricated”.

12. The commissioner dealt with the parity or consistency rules as follows in her award:

“The parity rule or consistency applies only to employees who have been found guilty of the same offence. In the case of Truworths Limited v Ramabulana NO & others (1999) 12 BLLR 1369 (LC) the Labour Court held that a CCMA commissioner had grossly erred by finding that the respondent employee had been unfairly dismissed because her supervisor was not disciplined for failing to detect the employee’s dishonest act whilst the supervisor was guilty of negligence whilst the applicant attempted to defraud the Company.

Section 192 of the Labour Relations Act 66 of 1995 places the onus of a fair and just dismissal on the Employer party.

My role is to consider whether the dismissal was substantively fair based on the facts, evidence and the law.

.....

The employer must have consistently applied the rule and dismissal must be the appropriate sanction for the contravention of the rule or standard.

.....

Consistency in the application of the Rule

The applicant admitted during cross examination that people who were involved in violence have been dismissed. The Union argued that the rules were not applied in a consistent manner as the security person was charged with assault and not dismissed and Mr Shiya had a personal gun in the Mine premises but he was not charged for that.

The Employer party argued that the rule has been consistently applied and as the applicant acknowledged that people who were involved in violence were dismissed.

The parity rule or consistency applies only to employees who have been found guilty of the same offence. I cannot accept the Unions argument that there was no consistency as they referred to different acts of misconduct. At no stage did the Union argue about what happened to Mr Shiya as it was alleged that he was also involved in inciting people.

I therefore find that on a balance of probabilities the rule has been consistently applied”.

13. It is clear from the passage quoted at paragraph 11 above that the applicants had raised the issue of consistency relating to Shiya and Banya. The applicants had argued that Shiya had a gun on him and was not disciplined. The commissioner recorded that Shiya had a gun but failed to record that he had also incited the Sothos to assault Xhosas. This was evidence led by the third respondent’s witnesses. The commissioner found that Shiya was alleged to have also been involved in inciting people but that the first applicant had not argued what had happened to him. She then found that the rule had been consistently applied after she had compared the second applicant’s charges with that of Banya.

14. The onus is on the third respondent as an employer to prove that the dismissal was for a fair reason. The third respondent had to lead evidence about what discipline had been imposed on Shiya. It is not clear from the award and the commissioner's transcribed handwritten notes what the outcome of Shiya's disciplinary hearing was. It is not clear what charges were preferred against him. This was a crucial aspect of the matter since the evidence was clear that Shiya committed the same misconduct as the second applicant. It is trite that an arbitration award would be reviewable when the award is one that a reasonable decision maker could not reach. The commissioner should have dealt with the issue of Shiya in her award and her failure to do so renders her award reviewable. The commissioner's award dealing with the issue of consistency is not one that a reasonable commissioner could have reached. It therefore fails the test and stands to be reviewed and set aside on this aspect only.
15. I am mindful of the fact that the matter should be referred to the CCMA for a *de novo* hearing on the aspect of consistency. I do not wish to make any comments about whether the fact that Banya, who was charged with assault and given a final written warning should have been dismissed. A commissioner should deal with this issue. The issue about Shiya needs to be dealt with. It would be unfair for me to make any pronouncements on it that might then have to be binding on the commissioner.
16. The application stands to be granted.
17. I do not believe that this is a matter where costs should follow the result.

18. In the circumstances I make the following order:

18.1 The commissioner's finding on the issue of consistency in the arbitration award dated 22 November 2005 made under case number FS7911/04 is reviewed and set aside.

18.2 The dispute is referred to the first respondent where the sole issue that needs to be determined by another commissioner other than the second respondent is whether the third respondent acted inconsistently in dismissing the second applicant.

18.3 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS : C ORR INSTRUCTED BY CHEADLE
THOMPSON & HAYSOM INC

FOR THIRD RESPONDENT : ATTORNEY KIRSTY YOUNG

DATE OF HEARING : 31 JULY 2008

DATE OF JUDGMENT : 5 AUGUST 2008