

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO JR 1482/08

In the matter between:

**KALAHARI GOLDRIDGE MINING
COMPANY LTD (THE KALGOLD
OPERATIONS OF HARMONY GOLD
MINING CO LTD)**

APPLICANT

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

TEBOGO BENJAMIN KUJANE NO

SECOND RESPONDENT

NATIONAL UNION OF MINEWORKERS

THIRD RESPONDENT

J NOVOLO

FOURTH RESPONDENT

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent, to whom I shall refer as ‘the commissioner’. In his award, the commissioner ordered the applicant to reinstate the fourth respondent, with effect from 14 April 2008, and to pay him back pay amounting to some R7500. The application for review was filed some seven weeks late, and the applicant has applied for condonation for the late filing of the application.

The facts

[2] The applicant charged the fourth respondent with theft and unauthorized possession of a pump belonging to Air Liquide, a contractor on the applicant's mine. The applicant claims that the fourth respondent was found in possession of the pump, being the property of a sub-contractor, Air Liquide, while driving out of a mine security area in circumstances where he was the passenger in a vehicle driven by a Mr. Mokoto, a person not employed by the applicant, and who transported the fourth respondent to and from the mine on a regular basis. The pump was found wrapped in a plastic bag, between the fourth respondent's legs, while he was sitting in the passenger seat of the vehicle.

The arbitration award

[3] In his award, the arbitrator summarised the evidence led at the hearing, and then proceeded to analyse that evidence. In his summary of the submissions made on the applicant's behalf, the commissioner states the following:

"It is the applicant's version that the wrong party in this matter had charged and dismissed the applicant for an alleged theft of company's property (pump). The complaint who charged and dismissed the applicant in this matter is Kalgold mine and it found that the alleged pump did not belong to Harmony Kalgold Mine, but to Air Liquid which is a sub contractor at the mine. The applicant challenged substantive fairness in this regard because the correct complainant in this matter was supposed to be Air Liquid not Kalgold mine. It is also the applicant's version that he was employed by Harmony Kalgold and not Air Liquid sub contractor therefore he did not breach any company rule (sic)".

[4] The commissioner then appears to endorse these submissions. He states the following:

“I fully agree with the applicant in statement given the fact that Harmony Kalgold in this matter was not supposed to appear as complainant but as Key witness to testify, since pump belonged to Air Liquid not the mine. It is the respondent’s version that a pump was found in-between applicant’s legs but not in possession of the applicant, yet he was charged with theft even though he was not in physical possession (sic).”

[5] The commissioner reaches the following conclusion:

“Applicant was wrongly charged and dismissed by a wrong party in this case. In addition the applicant was not found in possession of the alleged pump but it was not in his possession, and throughout its submission the respondent could not prove that the pump indeed belonged to et applicant not the other occupant who was the driver or even other passengers at the back who were also not called during the hearing to testify. By deciding on a case without involving key parties in the case rendered the whole procedure defective, and the applicant was charged and dismissed based on untested evidence. Applicant’s dismissal was both procedurally and substantively unfair and I therefore rule in the applicant’s favour...”

[6] The commissioner’s logic beggars belief. First, to the extent that he ruled in the fourth respondent’s favour because the applicant had initiated disciplinary proceedings rather than Air Liquide, this approach overlooks the elementary point that Air Liquide was not the fourth respondent’s employer, and that as a sub contractor on the applicant’s premises, Air Liquide had no right whatsoever to discipline the fourth respondent. Whether Air Liquide ought to have been a formal complainant in the disciplinary enquiry is neither here nor there. Secondly, the commissioner’s findings on the issue of possession (his award appears to turn on this point) are equally confused – it was undisputed that the fourth respondent was found in physical possession of the pump, in that it had been placed in a

plastic bag and was found lodged between the applicant's legs, as he sat in the passenger seat of the vehicle, when the vehicle was searched. What was in issue, initially at least was the claim by the driver, Motoko, that the plastic bag may have belonged to him. The evidence is clear though that once the bag and its contents had been examined by security officials, and Motoko saw that the bag contained a pump, he disavowed any knowledge of it. Motoko's explanation in this regard appears to be rejected without any proper basis to do so. Finally, the commissioner appears to have regarded the allegation of misconduct against the applicant to have been one of theft. This is the only way in which his misguided notions of ownership and possession can be understood. His approach overlooks the fact that the applicant had regarded the case as one of theft and unauthorised possession – the documents relevant to the disciplinary enquiry and appeal hearing make this clear. It is clear from the terms of the award that the commissioner failed to understand the meaning of possession in a legal sense, or even in the general sense of having control over an object. The evidence of Mvala and Mothlaping clearly established that the plastic bag was found in the fourth respondent's possession.

[7] I do not intend to burden this judgment with a repetition of the applicable test, save to say that where a commissioner fails to have regard to material facts, and misconceives the nature of any legal test to be applied, the commissioner would have failed to discharge his or her statutory mandate (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), *CUSA v Tao Ying Metal Industries & others* [2008] 29 ILJ 2461 at para 134, *Ellerine Holdings Ltd v CCMA & others* [2008] 29 ILJ 2899 (LAC)). In my view, in the present instances, the commissioner manifestly failed to conduct himself as a reasonable decision-maker would.

[8] It follows from what I have said that for the purposes of the application for condonation, the applicant has excellent prospects of success. Indeed, to allow the award to stand would be a gross injustice. In so far as the remaining

elements of the applicable test are concerned, I am satisfied that the delay in not overly excessive, and that the applicant has furnished an acceptable explanation for delay, and in particular, that it was always the applicant's intent, despite the misconceived applications for rescission of the award filed on its behalf, to seek to have the award set aside.

I accordingly make the following order:

1. The late filing of the application for review is condoned.
2. The arbitration award made by the second respondent on 25 March 2008 under case number NW775-08 is reviewed and set aside.
3. The matter is remitted back to the first respondent for re-hearing before a different commissioner
4. The third and fourth respondents are to pay the costs of these proceedings, jointly and severally, the one paying the other to be absolved.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Appearances:

For the applicant: Mr. J Olivier Brink, Cohen Le Roux Inc

For the respondent Dr N Cloete, Neville Cloete Attorneys Inc

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Date of hearing: 10 June 2010

Date of judgment: 17 June 2010