

REPUBLIC OF SOUTH AFRICA



Not Reportable
Of interest to other judges

**LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case:JR 189/2009

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

MICHAEL MOTEBANG & ANOTHER

Second & Further Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

SHAAM GOVENDER (N.O.)

Second Respondent

**KLOOF GOLD MINE, A DIVISION OF GFI
MINING SOUTH AFRICA (PTY) LTD**

Third Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

HEAD NOTES: (Leave to appeal – refused)

LAGRANGE, J:

Introductory remarks

[1] In the judgment handed down on 3 August 2011, I dismissed the applicants' review application of the second respondent's review arbitration award. The applicants now wish to appeal against the judgment.

[2] In summary, the individual applicants, Mr M Motebang and Mr M Mamba, were both bonus clerks employed by the third respondent, Kloof Gold Mine. In April 2008, they were dismissed for manipulating the bonus payment system so that certain employees who did not work underground would receive bonuses payable to underground workers which they were not entitled to. According to the mine, the applicants should have checked gang cards against the time and attendance system records and reported any discrepancies between the two. The applicants had allegedly changed the designated shifts of surface workers to reflect that they were working in underground gangs so that they would qualify for various bonuses payable only to underground

workers. The arbitrator found that the applicants' dismissal by the mine was both substantively and procedurally fair.

[3] Central to the charges was that the time and attendance system records could not be reconciled with the other records and it was part of the applicants' duties to have identified these anomalies and queried them. There was no material dispute that they failed to do so in the case of the workers who were awarded underground bonuses they did not deserve.

Grounds of Appeal Analysed

[4] The applicants allege the court erred in that the respondent did not provide evidence of misconduct on their part. No reasons are cited for this statement.

[5] The applicants claim that Mamba was the only one who processed all the bonus transactions. In this regard the applicants raised evidence on review which was not before the arbitrator (See paragraph 38 of the judgment) and is not correct in any event (See paragraph 23 of the judgment).

[6] The applicants persist in arguing that their failure to provide any evidence of who else might have manipulated the data should not have been the basis of drawing an adverse inference because the applicants did not have the same advantage as the respondent of knowing the results of the investigation which might have provided evidence of other persons' involvement. This was not a ground of review and in any event does not detract from the applicants' responsibility to show why someone else ought to be suspected of manipulating the shift designations on the computer system. The fact that underground workers were implicated in the alteration of original records does not detract from the applicants' own role in manipulating shift designations on the system. There was no suggestion that the shift workers who might have been party to the fraud could have done this themselves.

[7] The applicants allege that the court and arbitrator erred in that there was no evidence of what the data looked like before it was manipulated. Evidence of the audit trail was sufficient to show the alteration of electronic data by persons using the applicants' computer access.

[8] Contrary to the applicants claim, there was evidence of discrepancies between the records relied on by the applicants in processing the bonus

payments and the applicants failed to explain why these anomalies were not dealt with as they should have done.

[9] The applicants claim that the court erred in characterising their case as based on an argument that the evidence implicating them was insufficient, when in fact they claimed it was non-existent. In so far as the court did mis-characterise their case, this does not alter their prospects of success on appeal: the key question is whether there was sufficient evidence to support the arbitrator's finding.

[10] Even if the arbitrator had erred in finding Motebang guilty of all the charges levelled against Mamba, there was sufficient evidence to find him guilty of the charges which were levelled against him, so the arbitrator's finding in respect of those charges was not reviewable. There is no reason why his dismissal was not justifiable on that basis alone.

[11] The evidence of the trail of alterations to the computer records might not have been confirmed by an expert but the witness had sufficient knowledge of the system and bonus methodology to testify on the issue. The alternative is that the record of alterations had been fabricated to

falsely implicate the applicants and there was no evidentiary basis provided to support such an inference.

[12] The applicants' claim that the prior fraudulent acts of workers or some other third party in altering clocking records, does not detract from the key evidence which implicate their involvement: namely that they ignored the anomalies between the clocking records and the time and attendance records, thus making the payment of the fraudulently obtained bonuses possible. This evidence was not speculative as the applicants claim. Moreover, the trail of alterations indicated that their computer identities had been used to effect the alteration in the shift designations. In the absence of being able to identify any other plausible suspects this evidence implicated the applicants directly. Accordingly, the tampering of the computer evidence suggested it was done at a stage when the applicants were busy on the system.

[13] It is not correct that the only fraudulent alteration of information occurred before the intervention of the applicants. The key manipulation of primary data was the alteration of clocking records. There was never any suggestion that the electronically captured time and attendance records were inaccurate. In fact, precisely because they were accurate they did not match with altered gang cards, which is what should have

alerted the applicants that something was wrong, even if they had not also been implicated in actively manipulating the shift designation of workers so they qualified for the bonus.

[14] The question of Mamba's role being confined to signing the bonus sheet was only in respect of Sinjana's bonus and has no bearing on the other charges he was found guilty of.

[15] The applicants clearly fail to understand that the evidence of the manipulated transaction in respect of Mazibuko clearly was corroborative evidence which strengthened the reliability of the hearsay evidence in Mazibuko's affidavit.

[16] The court found that the applicants' witness was not without serious flaws nor was it comprehensive, hence no reliance could be placed on it on the question of the manipulation of gang cards.

[17] The statement in paragraph 35 of the judgment that it was necessary for the arbitrator to find that other employees participated in the scheme is a patent error and it is clear from the sentence which follows that the word 'not' should have been before the word

‘necessary’. Accordingly, but perhaps understandably, this criticism of the judgment is misplaced.

[18] The absence of the original information provided at the shaft did not prevent the respondent from implicating the applicants in dubious transactions, and was not essential to make out a case against them, which required an answer. In any event, even if the original electronic clocking information had been provided, the applicants would still have to explain the manipulation of the shift designations which was critical to awarding the bonuses.

Conclusion

[19] I am not persuaded on reviewing the grounds of appeal that another court might find that the arbitrator’s findings were unreasonable and should be set aside.

Order

[20] Accordingly, the application for leave to appeal is dismissed, with costs.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of judgment: 02 December 2011

(Considered in chambers)

LABOUR COURT