

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Not reportable

Case no: JR 385/2012

In the matter between:

HARMONY GOLD MINING COMPANY LIMITED

Applicant

~~and~~ And

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

JOHN MASHIKI N.O

Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

TUMELO MAFURA

Fourth Respondent

Heard: 7 May 2015

Delivered: 15 May 2015

Summary: Review application. Commissioner failed to consider the evidence and to make findings on a balance of probabilities. The award re-instating the Fourth Respondent was not reasonable. Award is reviewed and set aside.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 29 January 2012 wherein the Second Respondent (the arbitrator) ordered the Applicant to reinstate the Fourth Respondent (Mr Mafura).
- [2] The issue in dispute was whether Mafura's dismissal was substantively and procedurally fair.
- [3] The arbitrator found Mafura's dismissal procedurally fair but substantively unfair and ordered that he be re-instated retrospectively.

Background facts

- [4] The brief history of this matter is as follows:
- [5] The Applicant operates as a gold mine in the district of Evander, Mpumalanga Province. Mafura was employed as a miner and from 17 August 2011 he was *inter alia* responsible for the 16C13 Panel No 3 (the workplace) at the Evander Gold Mine.
- [6] As a miner Mafura had subordinates reporting to him and his responsibilities were not only production in respect of his section, but also the health and safety of his subordinates. Mafura had to ensure that his subordinates conduct their work in a safe manner and that he inspected working areas to ensure safety.
- [7] On 8 September 2011 the Applicant's acting mine overseer (MO) instituted disciplinary action against Mafura and the charges levelled against him were violation of safety rules and standards, not working to standard 7/9/11 and not obeying lawful and legitimate instructions.
- [8] The chairperson of the internal disciplinary hearing found Mafura guilty of misconduct and he was dismissed in terms of the Applicant's disciplinary code and procedure which provides that dismissal is an appropriate sanction for a first time violation of the safety rules and standards.
- [9] The Third Respondent (NUM) acting on behalf of Mafura referred an unfair dismissal dispute to the First Respondent (CCMA), challenging the substantive and procedural fairness of Mafura's dismissal.

- [10] As already stated the arbitrator found Mafura's dismissal procedurally fair but substantively unfair and ordered that he be re-instated retrospectively. The Applicant seeks to review and set aside the award reinstating Mafura. The application is opposed.

The arbitration proceedings and award

- [11] At the commencement of the arbitration proceedings NUM stated that the procedural fairness of Mafura's dismissal was challenged on the ground that there was a forgery of documents. The arbitrator found no basis for this complaint and held Mafura's dismissal to be procedurally fair and the finding on procedural fairness is not relevant for this review application.
- [12] On substantive fairness the main issue was that Mafura was given an instruction on 7 September 2011 and in terms of the provisions of the applicable policy he had three days to fix the problem. Instead he was suspended on 8 September 2011 and charged with misconduct on the same date, therefore he was not afforded an opportunity to fix the problem. It was further stated that the contractor who was supposed to do some of the pre-work did not come on time and Mafura was unable to carry out the instruction.
- [13] NUM accepted that the instruction was given on 7 September 2011, but disputed that Mafura was given three days to comply with it and therefore his dismissal was unfair.
- [14] The Applicant on the other hand stated that the instruction was placed on the notice board on 11 August 2011 and was given to Mafura on 26 August and on 1 and 7 September 2011 and that Mafura was aware of the instruction but deliberately ignored it and thereby violated the Applicant's safety rules and standards.
- [15] The evidence adduced during the arbitration proceedings and relevant for purposes of the application for review can be summarised as follows:
- [16] Mr Oosthuizen testified in his capacity as the acting mine overseer. His evidence was that he visited the workplace on 26 August 2011 and found several 'A-hazards'. An 'A-hazard' is one that can put people's lives in danger and if that is found, the practice is 'stop and fix' immediately. He instructed the

shift boss and Mafura to rectify the safety hazards. He visited the workplace again on 1 September 2011 and found the hazards he instructed them to rectify on 26 August 2011 were still not rectified and he instructed them to take certain steps to rectify the situation. He indicated to them that he would visit the workplace again in a week's time.

- [17] On 6 September 2011 and shortly before the expiry of the week he had granted Mafura and the shift boss to rectify the issues he identified, the safety department approached him and informed him that there were complaints about the safety of the workplace and there were fears that somebody might be killed.
- [18] On 7 September 2011 Oosthuizen visited the workplace with the safety department and noticed that most of the safety hazards captured in his previous report were still not rectified. He testified that those were the things he specifically instructed the shift boss and Mafura to rectify and their failure to do that put people's lives in danger, was not working according to standard and did not follow the rock mechanic's recommendations.
- [19] The following day Oosthuizen suspended the shift boss and Mafura and charged them with violation of safety rules, not working to standard and not obeying lawful instructions.
- [20] Oosthuizen testified that Mafura did not carry out instructions given to him to ensure that the workplace is safe and this endangered the lives of others. This impacted negatively on the trust relationship between the Applicant and Mafura.
- [21] The material parts of Oosthuizen's evidence were not disputed under cross-examination.
- [22] Mr Rathebe, the Applicant's chief safety officer testified that the report of the rock mechanic was on the notice board, located at the waiting place. The recommendations were not complied with and he inspected the workplace after he received complaints about the safety of the place. The inspection took place with Oosthuizen on 7 September 2011.

- [23] In his testimony Mafura testified that the instruction was given to him only on 7 September 2011 during the safety officer's visit. In cross-examination Mafura explained that the purpose of the notice board at the waiting place was for employees to get information from management and special instructions. He conceded that the Applicant's disciplinary code and procedure prescribes dismissal for violation of a safety rule, even where it is a first offence. He also conceded that if he did not adhere to regulations and recommendations of the Applicant it is unlawful, it could lead to disciplinary action being taken against him and somebody could die or get injured. Mafura explained that the reason why he did not rectify the safety hazards was because he did not have labourers available.
- [24] Upon a question from the arbitrator as to when he saw the safety hazards, Mafura responded that he saw the safety hazards on 24 August 2011 when he started at the workplace and from that day he started to make the area safe and to ensure that things were up to standard.
- [25] In considering substantive fairness the arbitrator moved from the premise that Mafura's non-adherence with instructions given to him violated the safety rules and standards therefore the dispute was 'whether Mafura was given an instruction on 11 and 26 August, 7 September or should have been reasonably aware of such instruction and deliberately ignored it thereby violating the Applicant's safety rules and standards.'
- [26] Moving from this premise the arbitrator found that there was no evidence to suggest that an instruction was given to anyone on 11 August 2011. He found that Oosthuizen testified that he gave the instruction to the shift boss on 26 August 2011 and he believed that it was discussed with the miners. The arbitrator found this evidence to be speculative and not supported by evidence and concluded that the instruction that was given on 26 August 2011 was only given to the shift boss.
- [27] Having found that Mafura was not given an instruction on 26 August 2011, the arbitrator concluded that the instruction was indeed given on 7 September 2011 and as Mafura was suspended on 8 September 2011 he was not afforded the required three days to attend to the problem and fix it. Mafura

never ignored the safety standards as he was attending to it but lacked the necessary labour to fully attend to it.

- [28] The arbitrator found Mafura's dismissal substantively unfair and reinstated him.

The grounds for review

- [29] The Applicant seeks to review the findings and raised three main grounds for review.

- [30] The first main ground for review is that the arbitrator failed to apply his mind to pertinent facts.

- [31] It is the Applicant's case that the arbitrator ignored pertinent facts. These are that Mafura was an experienced miner and appointed to the workplace on 17 August 2011, that he was appointed in a position of great responsibility where he had to ensure the safety of the persons working under his supervision, Mafura was aware of the seriousness of not adhering to safety regulations in that somebody could die or be injured and he knew that violation of safety rules and regulations is sanctioned by dismissal. Furthermore the 'miner's daily report' of 26 August 2011 identified a deviation from the standard and required Mafura to stop and fix the hazards, Mafura confirmed that the hazards identified in the 'miner's daily report' of 26 August 2011 were the same as those identified in the MO report issued on 11 August 2011. The MO report had been on the notice boards since 11 August 2011 and on Mafura's own version the purpose of the notice board at the waiting place is for him and the crew to read and get information from the line-up, management, the shift boss and the MO. On this version of Mafura he should have been aware of the hazards and the instruction that was on the notice board since 11 August 2011.

- [32] Mafura further admitted that Oosthuizen visited the site again on 1 September 2011 and that the hazards were still not fixed and he admitted that on 3 September 2011 it was still not fixed.

- [33] On Mafura's own version he saw the safety hazards on 24 August 2011 when he started at the workplace and from that day he started to make the area safe and ensured that things are according to the required standard.
- [34] The arbitrator found that the instruction was given on 26 August 2011, but only to the shift boss and not to Mafura directly. Mafura was only instructed on 7 September 2011.
- [35] It appears that the arbitrator was of the view that the instruction should have been given to Mafura directly and personally and the only proof of the instruction that was given to Mafura is the MO's book which he signed on 7 September 2011 acknowledging the instruction. Therefore Mafura was only instructed on 7 September 2011.
- [36] The arbitrator found that Oosthuizen testified that he gave the instruction to the shift boss on 26 August 2011 and he believed it was discussed with the miners, including Mafura. This evidence the arbitrator found speculative and unsupported. The transcribed record however shows that Oosthuizen's uncontested evidence was that on 26 August 2011 he instructed the shift boss and Mafura to rectify the safety hazards and that he visited the workplace again on 1 September 2011 and found the hazards he instructed them to rectify on 26 August 2011 were still not rectified and he instructed them again to take certain steps to rectify the situation.
- [37] The arbitrator, without any justification, found uncontested evidence speculative and unsupported. He did not consider the uncontested evidence that there was a follow-up visit and instruction on 1 September 2011 at all. The arbitrator acknowledged that Mafura noted the problems in his daily report of 26 August 2011, but found that he never ignored the safety standards and was constantly attending to the problems.
- [38] It is evident that in finding that Mafura was only instructed on 7 September 2011 the arbitrator ignored material and pertinent parts of the evidence adduced and he reached a conclusion that is not only disconnected from the evidence adduced but that is also unreasonable.
- [39] The arbitrator further found that Mafura was attending to the safety issues but could not fully attend to it as he had staff shortages. This version was however

never put to Oosthuizen when he was cross-examined. Mr Molebaloa on behalf of Mafura submitted that the shortages of staff was captured in the 'miner's daily report' and despite the fact that it was not put to Oosthuizen, the arbitrator could consider that as he was enjoined to consider the evidence placed before him and his award could not be faulted. This argument cannot be accepted. It is trite that witnesses should be granted an opportunity to respond to the version of the other party and without that opportunity evidence is untested and cannot be merely accepted. An inscription on a miner's report cannot be accepted simply because it is part of the documents without its contents being tested and put in a proper context. The version put to Oosthuizen was that the contractor did not arrive on time and therefore Mafura was unable to fix the problems.

- [40] The second main ground for review is that the arbitrator failed to attach sufficient weight to the evidence adduced by the Applicant's witnesses. The Applicant's case is that the evidence of Oosthuizen was uncontested and remained mostly unchallenged, yet the arbitrator failed to take crucial parts of his evidence into account and failed to attach proper weight to the clear, consistent and undisputed evidence. Two other witnesses corroborated the evidence of Oosthuizen. Mafura's evidence was bald denials and maintaining that no instruction was given to him on 26 August 2011.
- [41] The third main ground for review is that the arbitrator failed to consider or ignored the inconsistencies in Mafura's testimony.
- [42] In my view these are not two separate grounds for review but both relate to the manner in which the arbitrator evaluated and dealt with the versions presented and the evidence adduced in support of these versions.
- [43] It is the Applicant's case that the arbitrator failed to perform a very crucial task namely to weigh up the versions of evidence presented and to make a finding on a balance of probabilities.
- [44] From a perusal of the transcribed record and the arbitration award it is evident that the arbitrator completely discounted several important and unchallenged aspects of the evidence adduced by the Applicant's witnesses.

- [45] For instance the arbitrator ignored the fact that Oosthuizen testified that he gave Mafura the instruction on 26 August 2011, that he revisited the workplace on 1 September 2011 and repeated the instruction and informed Mafura and the shift boss that he would visit the site again in one week's time and when he visited the workplace again on 7 September 2011, the safety hazards were still not rectified. Mafura's own version was that he was aware of the safety hazards since 24 August 2011, he should have been aware of instructions placed on the notice board and had in his 'miner's daily report' of 26 August 2011 identified a deviation from the standard. Considering these versions and the inherent probabilities, it is astonishing that the arbitrator came to a conclusion that Mafura was instructed for the first time on 7 September 2011 and that he never ignored the safety standards.
- [46] It is evident from the record that there were inconsistencies in the version presented by Mafura and the version put forward to the Applicant's witnesses under cross-examination. The arbitrator failed to deal with these inconsistencies but merely preferred and accepted Mafura's version without any logical reasoning or justification.
- [47] The Applicant and Mafura testified that a breach of safety rules is very serious as the consequences could be death or injury and dismissal was an appropriate sanction, even for a first offence.
- [48] An arbitrator in considering whether a dismissal was fair is also required to determine whether the sanction of dismissal was appropriate. In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*¹ the Constitutional Court set out the factors to be considered in determining the fairness of the sanction. A consideration of these factors is glaringly absent from the arbitration award.
- [49] The arbitrator failed to consider the probative value of the Applicant's evidence in respect of its rules and procedures, Mafura's knowledge and understanding of the rules, the instructions given to him and the possible grave consequences of not following the instructions, the seriousness of the misconduct and the reasonableness of the sanction. The arbitrator completely failed to understand or appreciate the seriousness of the misconduct and the gravity of the breach of safety regulations.

¹ (2007) 28 ILJ 2405 (CC) at para 268

[50] The Applicant's testimony was that the trust relationship between the employer and Mafura was broken down to the extent that Mafura could no longer be trusted. Mafura's misconduct was serious with potential grave consequences. This testimony was uncontested. Despite this, the arbitrator had no regard for the seriousness of the misconduct and the uncontested version that Mafura could no longer be trusted when he ordered the Applicant to reinstate Mafura.

[51] In *Sasol Mining (Pty) Ltd v Ngqeleni N.O. and Others*², this Court held that:

"One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish the task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each witness and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability and improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis."

[52] In *Sidumo*³ the Constitutional Court held that:

"...where a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair, because the commissioner fails to perform his or her mandate. In doing so, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by s145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."

[53] It is evident from the arbitration award that the arbitrator did not address, let alone resolve, the fundamental disputes of fact. One would look in vain to find any reasoning in the award why the Applicant's version was rejected and

² (2011) 32 ILJ 723 (LC) para 9 – 10.

³ *Supra* at para 268

Mafura's version was preferred. There is no assessment and evaluation of the material evidence adduced and no consideration of the inherent probability or improbability of each party's version.

- [54] The arbitrator is required to consider all relevant evidence and to undertake a balanced, equitable and impartial assessment of the evidence and to make a finding on the balance of probabilities that is reasonable. *In casu* the arbitrator failed to do that and I cannot but find that he has committed a gross irregularity that is subject to review.

The test on review

- [55] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable is well established and has been rehashed innumerable times since *Sidumo* as 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach?' The arbitrator's decision must fall within a range of decisions that a reasonable decision maker could make.
- [56] In the decision of *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁴ the Supreme Court of Appeal 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 s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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 the 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."

- [57] In the subsequent judgment of *Goldfields Mining South Africa v Moreki*⁵ the Labour Appeal Court held that:

⁴ (2013) 34 ILJ 2795 (SCA) at para 25

⁵ (2014) 35 ILJ 943 (LAC) at para 16.

“In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.”

Conclusion

- [58] In reviewing the arbitration award, the grounds for review as raised by the Applicant must be assessed and the test to be applied is a strict and stringent one.
- [59] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator in respect of substantive fairness and the grounds for review as raised by the Applicant, the arbitrator's findings cannot be regarded as reasonable findings.
- [60] I find that the arbitrator's decision fell outside of the band of decisions to which a reasonable decision maker could come to and is therefore subject to review.
- [61] Based on the above, I am persuaded that this award cannot stand and should be interfered with on review. The record placed before this Court is complete and I am in a position to determine the matter finally.

Order

- [62] In the premises I make the following order:

63.1 The arbitration award issued on 29 January 2012 under case number MP7538-11 is reviewed and set aside;

63.2 The award is substituted with the following order: The Fourth Respondent's dismissal was fair;

63.3 There is no order as to costs.

Connie Prinsloo

Acting Judge of the Labour Court

Appearances:

For the Applicant : Mr J Olivier from Webber Wentzel Attorneys

For the Third and Fourth

Respondents: Mr Molebaloa from M S Molebaloa Attorneys

LABOUR COURT