THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2235/13

In the matter between:

HARMONY GOLD MINING COMPANY LIMITED **Applicant**

and

THYS LEFOSA **First Respondent**

NATIONAL UNION OF MINE WORKERS **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

PETER GREYLING, N.O. **Fourth Respondent**

Heard: **14 July 2016**

Delivered: **07 February 2017**

JUDGMENT

AINSLIE, AJ

Introduction

[1] This is a review application in terms of section 145 of the Labour Relations Act[1]. The record in this matter is voluminous with the arbitration hearing that took place over the course of three days.

[2] The Fourth Respondent (the Commissioner) found that the dismissal of the employee, the First Respondent (Mr Lefosa), by the Applicant (the Company) was substantively unfair since the Company failed to prove that Mr Lefosa made himself guilty of the allegations of misconduct that were levelled against him.

[3] The Commissioner found that Mr Lefosa's dismissal was procedurally fair.

[4] The Company was ordered to reinstate Mr Lefosa and to pay him back pay amounting to nine months' remuneration.

[5] The Company submits that on a proper analysis of all the evidence that served before the Commissioner and of the award, the Commissioner's finding that Mr Lefosa's dismissal was substantively unfair and his decision to reinstate Mr Lefosa, was one that a reasonable decision maker could not reach.

[6] Mr Lefosa opposes the review application.

[1] 66 of 1995.

[7] In addition to seeking an order reviewing and setting aside the award, the Company also seeks the substitution thereof with an order that the dismissal of Mr Lefosa was substantively fair.

Applicant's Grounds of Review

[8] The Company submitted that the arbitration award stands to be reviewed and set aside on one or more of the following grounds:

8.1 The Commissioner committed a gross irregularity and/or misconduct in that he misconstrued the allegations against Mr Lefosa and, consequently, he misconstrued the nature of the enquiry before him (review ground 1);

8.2 The Commissioner committed misconduct and/or a gross irregularity in failing to apply his mind to material facts regarding the existence of the rule and, consequently, reached the conclusion that a reasonable decision maker could not have reached (review ground 2);

8.3 The Commissioner committed misconduct and/or a gross irregularity in failing to apply his mind to the material evidence regarding the meaning of "housekeeping" in the context of the Smelt House and, consequently, reached a decision that a reasonable decision maker could not have reached (review ground 3);

8.4 The Commissioner committed misconduct and/or a gross irregularity in disregarding the material evidence regarding the intolerability of the continued employment relationship between Mr Lefosa and the Company and, consequently, reached a decision that a reasonable decision maker could not have reached with respect to the appropriate remedy (review ground 4);

8.5 The Commissioner committed a gross irregularity and/or reached a decision that a reasonable decision maker could not have reached, in light of the evidence before the Commissioner (review ground 5);

Material Background Facts

[9] At all material times, Mr Lefosa was employed by the Company as its Chief Smelter at its Kalgold operations. Mr Lefosa reported directly to Mr Jacob Mosiane (Mr Mosiane), the acting Business Unit Leader. Mr Mosiane reported to Mr Ramosiako Montshonyane (Mr Montshonyane), the acting Plant Manager. Mr Monshonyane in turn reported to Mr Paul Van As (Mr Van As), the group Metallurgist.

[10] As the Chief Smelter, Mr Lefosa worked in the Company's Smelt House. The core function of the Smelt House is the processing and refining of the gold from the ore that has been mined. As a result, the Smelt House is a high risk operation and, therefore has stringent security measures.

[11] It has been submitted on behalf of the Company that as a result of the processes in the Smelt House, every single particle therein is considered to contain gold particles. The Company's stringent security measures require that any item that enters the Smelt House must be destroyed in the Smelt House and may not again leave the Smelt House.

[12] From time to time, the Company embarks on a "clean-up operation". During such an operation, the Company collects and refines sludge material from, amongst other places, its sumps and eluent tanks. This sludge, it was submitted, contains gold bearing material that can be processed to recover gold. Some solid gold accumulates at the bottom of the eluent tank during the clean-up process. This is then also where the Company will typically find gold bearing material during the "clean-up operations".

[13] On or about 2 April 2013, Mr Montshonyane requested the eluent tank to be opened and cleaned to recover the sludge in it. During this "clean-up process", four drums of sludge were recovered. The four drums were all stored in the Smelt House.

[14] The content of two of the four drums was smelted in the Smelt House subsequently, under the supervision of Mr Lefosa. Mr Lefosa reported that no gold was retrieved from the smelting process.

[15] On or about 3 May 2013, Mr Van As requested to see the two remaining drums as he believed that it was impossible that the content of the four drums did not contain any gold bearing material. Mr Van As wanted to be present when the content of the two remaining drums was smelted.

[16] In anticipation of Mr Van As' attendance, Mr Lefosa was instructed to do "Housekeeping". The instruction was given to Mr Lefosa by Mr Mosiane.

[17] On or about 4 May 2013, Mr Montshonyane went to the Smelt House to verify and inspect the two remaining drums. He was unable to find the two remaining drums. Upon making enquiries, Mr Lefosa told Mr Montshonyane that he (Mr Lefosa) disposed of the content of the two drums by pumping it through the gravity spillage pump located inside the Smelt House.

[18] Mr Lefosa was subsequently charged with the following acts of misconduct:

> "18.1. Gross Misconduct in that you have allowed the removal of possible gold bearing material from the smelthouse without the necessary authorisation. The smelthouse is a high risk area. This is a dishonest act in that the action concealed possible gold theft from the smelthouse.
>
> 18.2. Gross negligence in that you have allowed the destroying of evidence that could have proven possible gold theft from the smelt house which is a high risk area."

[19] Mr Lefosa was dismissed and subsequently, with the assistance of the Second Respondent (NUM) referred an unfair dismissal dispute to the CCMA.

<u>The Commissioner's award</u>

[20] In concluding that Mr Lefosa's dismissal was substantively unfair, the Commissioner made the following findings:

20.1 Messrs Montshonyane, Van As and Boshof insisted that there was a rule that Mr Lefosa was not entitled to wash down the sludge and that it could only have been done after permission was obtained from Mr Montshonyane. None of the witnesses were able to provide any documentary proof of the existence of such a rule. There was furthermore no evidence of any instructions or policy issued by management as to how to deal with eluent material;

20.2 Mr Mohabe, a Business Unit Leader stated that Mr Lefosa was entitled to make the decision to pump the eluent material back into the system. Mr Mohabe was of the opinion that Mr Montshonyane and Mr Van As did not really understand the processes in the Smelt House. Mr Mohabe furthermore testified that after Mr Lefosa was suspended, nobody was prepared to move materials from the Smelt House. The Commissioner indicated that it was apparent that there was confusion as to the rule;

20.3 The eluent material was washed down in the presence of the security establishment. If there had been rules to the contrary, the security compliment would have been aware of the rules;

20.4 After the first two drums were tested, Mr Montshonyane did not give any specific instructions as to what should happen to the remaining two drums. Mr Montshonyane and Mr Van As only decided to test the remaining two drums at a later stage;

20.5 The Commissioner questioned why it was necessary for Mr Montshonyane to warn the Smelt House of the fact that a senior individual was visiting the Smelt House;

20.6 The Commissioner also questioned why Mr Montshonyane made enquiries as to the whereabouts of the remaining two drums the morning before Mr Van As' inspection. In particular, the Commissioner questioned why such enquires would be necessary if there was a hard and fast rule that the two remaining drums' should not be destroyed;

20.7 It was impossible to establish whether the sludge contained gold bearing material;

20.8 No evidence was presented that the purpose of washing down eluent material was to destroy evidence of wrong doing and that the Company suffered financial loss;

20.9 There was further no evidence that Mr Lefosa tried to conceal the theft of gold bearing material.

[21] The Commissioner concluded that the Company failed to prove that Mr Lefosa made himself guilty of the alleged allegations of misconduct.

<u>Assessment of the grounds of review</u>

[22] It was argued by Mr Malan, appearing for the Company, that the Commissioner committed a gross irregularity in that he misconstrued the nature of the enquiry before him. He specifically referred to paragraphs 23 and 25 of the award where the Commissioner found that:

22.1 It was impossible to establish whether the sludge contained gold bearing material; and

22.2 There was no evidence that Mr Lefosa tried to conceal the theft of gold bearing material and that the Company suffered financial loss.

[23] It was argued that the Commissioner had a material lack of understanding of the enquiry that he had to undertake. Based on the wording of the complaints against Mr Lefosa, it was not necessary for the Company to:

23.1 Prove that there was in fact gold bearing material in the eluent tanks and therefore in the remaining two drums;

23.2 Prove that Mr Lefosa actually discarded the content of the remaining two drums to destroy evidence of theft; and

23.3 Prove that the Company suffered a loss as a result of Mr Lefosa's actions.

[24] Instead, it was argued that the Company only had to demonstrate that:

24.1 There was *possible* gold bearing material in the two remaining drums; and

24.2 Mr Lefosa allowed the contents of the two drums to be pumped away in circumstances where the contents *could* have proven *possible* gold theft.

[25] To my mind, the Commissioner did embark on the wrong enquiry and asked the wrong questions. He diverted from the correct path and essentially failed to address the correct issues that were raised for determination.

[26] Mr Malan referred me to the judgment in *African Bank v Magashima & Others*[2] where it was held that once the Commissioner misconstrues the nature of the enquiry before him/her, the result will invariably be unreasonable.

[27] I am of the view that in this matter, the fact that the Commissioner misconstrued the nature of the enquiry before him, in fact resulted in an unreasonable finding.

[28] To my mind, had the Commissioner embarked on the correct enquiry, he would have considered the evidence that served before him regarding the fact that the two remaining drums *possibly* contained gold bearing material. This evidence include but is not limited to the following:

28.1 Mr Van As' evidence that there are two sets of products namely physical gold and sludge. Whilst physical gold is gold in metal form that can be separated, the sludge would also contain gold;

28.2 Mr Van As' evidence that sludge is never thrown away. Sludge is dispatched to Rand Refinery;

28.3 The sludge accumulated during May 2012, which included the sludge from the first two drums that were smelted, was sent to Rand Refinery. According to the results received from Rand Refinery, there were relatively high values of gold in the sludge;

28.4 Mr Montshonyane's evidence that it was possible for the material to have gold in it because when the first two drums were smelted, gold was found in the samples of the sludge;

28.5 Mr Lefosa's own confession that there was a possibility that the sludge from the first two drums contained gold. In this regard, the Commissioner himself asked Mr Lefosa the following:

[2] (JR2419/12) [2014] ZALCJHB 298 (5 August 2014) unreported case.

“Commissioner:	But the essence is that there was a possibility that they could have contained gold?
Mr Thys Lefosa:	Correct.
Commissioner:	Now in the second two drums let’s assume that it will also not smelt out any gold, because they come from the same drum eluent tank is that what you call it?
Mr Thys Lefosa:	Yes.
Commissioner:	but then there is still a possibility that their might be gold in the sludge, isn’t it?
Mr Thys Lefosa:	Yes it is.”

28.6 Mr Sehlapelo’s evidence that the remaining two drums contained gold bearing material and that there was a possibility that there was gold in those drums.

[29] Had the Commissioner considered the evidence referred to above, he would not have reached the conclusion which he came to in paragraph 23 of his award but would have found that the Company did prove that the remaining two drums possibly contained gold bearing material.

[30] Similarly, had the Commissioner embarked on the correct enquiry regarding the second complaint against Mr Lefosa, he would have considered the following evidence:

30.1 Mr Van Der Merwe’s evidence that gold is the primary product of the Company, and that when gold is lost or stolen the Company suffers financial loss;

30.2 Mr Van As' evidence that the Company's Kalgold operations experienced a shortage of gold production over a period of time and that he, with the acting Plant Manager, devised a plan to investigate possible gold losses;

30.3 Mr Van As' evidence that upon being told that the first two drums yielded no gold, he was interested to see the content of the material that came out of the eluent tank and his evidence that he wanted to be present at the smelting of the remaining two drums' contents;

30.4 Mr Montshonyane's evidence that he instructed Mr Mosiane that Housekeeping must be performed in anticipation of Mr Van As' visit to the Smelt House;

30.5 The evidence that Mr Lefosa was instructed to ensure that Housekeeping is done in anticipation of a visit from Senior Management;

30.6 Mr Lefosa's evidence that he received the instruction to do good Housekeeping from Mr Mosiane on 1 May 2012 and that he discarded the contents of the remaining two drums on 3 May 2012 as part of the Housekeeping exercise;

30.7 The Company's overall evidence that because the content of the two remaining drums was discarded, the Company was unable to determine the source of the gold losses.

[31] Had the Commissioner considered the evidence listed above, along with the probabilities of the witness's evidence, he would have come to a different conclusion than the one that he came to in paragraph 25 of the arbitration award and would have found that Mr Lefosa was guilty of the second complaint against him.

[32] In light of the above, I am of the view that the Commissioner misconstrued the nature of the enquiry before him and this defect resulted in an unreasonable result that is not connected with the evidence that was placed before him.

[33] Accordingly, I find that the arbitration award is reviewable in its entirety on this ground alone.

[34] Notwithstanding the above, I will in any event briefly deal with the Company's remaining grounds of review.

[35] It was argued on behalf of the Company that the Commissioner failed to have regard to material facts regarding:

35.1 The existence of the rule (review ground 2);

35.2 The meaning of "Housekeeping" (review ground 3)

and as a result reached a conclusion that a reasonable decision maker could not have reached.

[36] Regarding the existence of the rule, Mr Lefosa initially alleged that he, as the Chief Smelter in the Smelt House, had the authority to wash the content of the two remaining drums away and that there was no rule or practice stating that he needed the permission of the acting Plant Manager to discard material.

[37] All of the Company's witnesses testified that Mr Lefosa was not permitted to remove any possible gold bearing material from the Smelt House without the authorisation of at least the Plant Manager.

[38] Mr Mosiane, one of Mr Lefosa's witnesses, agreed and testified that Mr Lefosa did not have authority to discard possible gold bearing material.

[39] Mr Lefosa was extremely vague in his evidence when asked about the rule. In his evidence, he suggested that the Business Unit Leader or Plant Manager had to make a decision whether to continue smelting material or whether to throw it out.

[40] To my mind, the Commission placed undue weight on the absence of a written rule or policy especially in circumstances where there was direct evidence from a number of witnesses regarding the existence of a rule. The Commissioner equally attached undue weight to the evidence of Mr Mohabe. Mr Mohabe's evidence on which the Commissioner relied in his award, namely that Mr Montshonyane and Mr Van As did not understand the processes in the Smelt House was never put to either of these witnesses. The Commissioner accordingly committed an irregularity in relying on Mr Mohabe's evidence in this regard.

[41] In addition, the Commissioner also attached undue weight to the fact that the content of the remaining two drums were washed away in the presence of the security establishment. There was simply no evidence before the Commissioner to suggest that the security officers who were present were aware of whether the dumping was appropriate or not or carried out with the necessary permission.

[42] In assessing whether the rule existed or not, the Commissioner made no attempt to resolve any factual dispute. He offered no basis or support for rejecting the evidence of the Company's witnesses who all corroborated the Company's version and who, by virtue of their positions within the Company's structure, were best placed to testify about the Company's practices and procedures. Similarly, the Commissioner offered no explanation for preferring Mr Mohabe's evidence.

[43] Accordingly, I agree that the Commissioner failed to apply his mind to material facts regarding the existence of the rule and that he reached a conclusion that a reasonable decision maker could not have reached.

[44] Turning to whether Mr Lefosa was indeed instructed to pump away the content of the remaining two drums as part of the Housekeeping exercise, there was a material dispute of fact before the Commissioner.

[45] During the arbitration proceedings, the various witnesses testified as follows regarding the "Housekeeping" process:

45.1 Mr Lefosa indicated that he disposed of the content of the remaining two drums as part of the Housekeeping exercise;

45.2 Mr Lefosa himself testified that good Housekeeping was to "take things and pack them accordingly";

45.3 Mr Van As testified that good Housekeeping simply involved placing everything in the Smelt House in its correct place. This was corroborated by Mr Montshonyane, Mr Mosiane and Mr Sehlapelo.

45.4 Mr Van As testified that whilst Mr Lefosa had discarded the content of the remaining two drums (allegedly as part of the Housekeeping operation) he did not dispose of the rubbish in the Smelt House or the polystyrene containers which contained food and which were piled up in the airlock. This evidence was not disputed;

45.5 Mr Van As was adamant in his evidence that the Company does not get rid of gold bearing material in the process of Housekeeping;

45.6 It was common cause that the two remaining drums were stored in the airlock and that it ought not to have been stored there. Mr Van As testified that as part of the Housekeeping operation, the two drums ought to have been taken out of the airlock area and ought to have been put in its correct place. The material should not have been thrown away;

45.7 Mr Montshonyane also testified that the Housekeeping process did not entail the removal of gold bearing material. Apart from Mr Van As' evidence about the poor state of the Smelt House, Mr Montshonyane testified that in addition to the two drums of material which Mr Lefosa discarded, there was a third drum in the Smelt House that contained rocks. Mr Lefosa did not remove this third drum with rocks but only removed the two drums that contained the sludge;

45.8 Mr Boshof corroborated the presence of a third drum containing rocks which Mr Lefosa did not remove during the Housekeeping exercise. Mr Boshof came to the conclusion that Mr Lefosa used the Housekeeping exercise as a "cover-up" because the third drum containing rocks was kept inside the Smelt House;

45.9 Mr Mosiane testified that he gave Mr Lefosa the instruction of the good Housekeeping that "inspired him to discard those drums". During cross examination, he was confronted with his earlier version of the events which he gave during the internal disciplinary enquiry namely that he did not give Mr Lefosa an instruction to pump the contents of the remaining two drums through the gravity pump and that Mr Lefosa took this decision on his own;

45.10 It appears from Mr Lefosa's evidence that he discarded the content of the two remaining drums because it was waste material. In his evidence he indicated that after the smelting of the first two drums, Mr Montshonyane told him that it was better to discard the rest of the material as it was a waste of chemicals and electricity. He did not discard it at the time. He only discarded the material on 3 May 2012 after he was instructed to clean the Smelter House and to remove all waste materials on 1 May 2012. He contended that by virtue of these two instructions, he discarded the content of the two remaining drums.

[46] Apart from considering the fact that the material was washed out in the presence of security, the Commissioner failed to have regard to any of the evidence listed above.

[47] He furthermore failed to have regard to the probability of Mr Lefosa's version. As Mr Malan indeed put it, the fact that Mr Lefosa seems to have only attended to the discarding of the contents of the two remaining drums as part of the Housekeeping exercise but failed to clear out the rocks and items that were obviously meant to be cleared out, is strongly indicative of the fact that Mr Lefosa wanted to cover-up possibly evidence of theft.

[48] Insofar as it was Mr Lefosa's version that he had an earlier instruction from Mr Montshonyane to discard the rest of the material as it was a "waste of chemicals and electricity", the Commissioner did not deal with this evidence in any meaningful way either. In evaluating this piece of evidence afresh, Mr Lefosa's version and that of Mr Mosiane namely that Mr Montshonyane told Mr Lefosa to discard the rest of the materials, being the third and fourth drum, as it was a "waste of chemicals and electricity" was never put to Mr Montshonyane. Mr Ngangiwe, who appeared for Mr Lefosa, conceded that this evidence of Mr Lefosa and of Mr Mosiane was untested. The further difficulty I have with Mr Lefosa's version is that he never discarded the rest of the material when he was, on his version, instructed to do so by Mr Montshonyane. On his own version he waited until the beginning of May after he became aware of Senior Management's intended visit.

[49] To my mind, had the Commissioner applied his mind to the evidence listed above and had he considered the probabilities of the witnesses' versions and their credibility as he was tasked to do, he would have found that Mr Lefosa was not instructed to dispose of the contents of the remaining two drums as

part of the Housekeeping exercise. Instead, the Commissioner came to a decision that a reasonable Commissioner could not have come to.

[50] Regarding the fourth ground of review, I similarly find that the Commissioner reached a decision that a reasonable decision maker could not have reached with respect to the appropriate remedy.

[51] It is clear from the award that the Commissioner did not have any regard to the appropriateness of reinstatement as a remedy even in circumstances where the Commissioner believed that the dismissal was unfair.

[52] In my view, there was ample evidence before the Commissioner to suggest that reinstatement may not be appropriate. This evidence included evidence regarding the Smelt House being a high risk area and evidence in support of the fact that the trust relationship between the parties has broken down irretrievably. There was simply no independent assessment of any evidence relating to the appropriateness of sanction.

[53] By way of summary, in applying the review test and in particular the analysis which the Labour Appeal Court conducted in the matter of *Head of the Department of Education v Mofokeng and Others*[3], to my mind, the relevant facts which the Commissioner ignored constitute material facts. Had the Commissioner considered these facts and the probabilities, he would have come to a different conclusion on the finding of Mr Lefosa's guilt and on sanction. As a result, the award is *prima facie* unreasonable and there is no basis in the evidence to displace the *prima facie* case of unreasonableness. The Commissioner's failure to consider a number of material facts distorted

[3] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); [2015] 36 ILJ 2802 (LAC).

the outcome of the hearing and resulted in an unreasonable and thus reviewable award.

[54] Accordingly, the award stands to be reviewed and set aside.

Substitution of the award

[55] As indicated above, the Company seeks the substitution of the award with an order that the dismissal of Mr Lefosa was substantively fair.

[56] The record before this Court is complete and in the interests of justice and expeditious dispute resolution, I can see no reason why the award cannot be substituted.

Order

[57] In the result, the following order is made:

57.1 The arbitration award issued by the Fourth Respondent is reviewed and set aside;

57.2 The arbitration award is substituted with an order that the First Respondent's dismissal was fair;

57.3 There is no order as to costs.

Ainslie, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Fritz Malan
Instructed by:	ENS Inc.
On behalf of the Respondent:	Luyanda Nyaugiwe
Instructed by:	Isang Nakale Inc.