



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case Number: JR 2202/11

In the matter between:

HARMONY GOLD MINING COMPANY LTD

Applicant

And

CCMA

First Respondent

COMMISSIONER JOHN MASHIKA N.O.

Second Respondent

DANIEL MTINTO

Fourth Respondent

Date heard: 4 February 2016

Delivered: This judgment was prepared in April 2016 but only delivered on 22 February 2017 due to an administrative error.

JUDGMENT

RABKIN-NAICKER J

[1] This matter involves an application to review an arbitration award and a cross-application which was filed one year and nine months late for which condonation is sought.

[2] I decline to condone the late filing of the cross- application on the usual principles. The delay is substantial. The explanation therefore is unreasonable. It amounts to the following:

“Mitinto’s explanation for not instituting the cross-review in time is that, since he had been reinstated even though he had been unfairly found guilty of the misconduct, taking the guilty verdict on review would spoil the prospects of continued good employment relationship with Harmony.

Hence, he only instituted the cross-review proceedings when it was confirmed to him that the Applicant was not willing to reinstate him in terms of the award, was not willing to settle it out of court, and was continuing with the review Award.”

[3] In addition to the above, the ‘cross- review’ is ill-conceived in that it is not specifically brought against the outcome of the award but against a finding contained in it. I therefore deal with the application to review the award below.

[4] In his award, The Commissioner pronounced as follows:

“AWARD

44. I find that the guilty verdict meted out against the Applicant is fair. I however find that the sanction of dismissal is harsh under the circumstances.

45. The dismissal sanction is therefore set aside and replaced with the sanction of Severe Written Warning effective from the date of dismissal.

46. The Respondent is ordered to reinstate the Applicant retrospectively to the same or similar position he occupied as at the date of dismissal I have taken the importance of the rule for the respondent and also the applicant’s involvement into this and I therefore do not believe that this is a case where back pay should be ordered.

47. The Applicant must report for duty on 12 September 2011 at Evander Gold Mine in Evander.”

- [5] The fourth respondent (Mtinto) was employed by the applicant in 1999. On the 24 January 2011 his car was found at the mine's number 3 boom. His fifteen year old son was in the passenger seat. The car was searched by mine security officials and two train track rails were found in the rear of the vehicle, covered in blankets. Mtinto's son indicated that the car had run out of petrol and that his father, the Fourth Respondent, had walked to the nearest petrol station to purchase fuel. As to the rails he indicated that they were loaded by his father and himself that morning at the applicant's premises and that they intended take the rails to sell in a scrap yard. The son further explained that the rails had been in the yard of their house at the marital quarters owned by the mine. The car had no keys in it and the son explained that the fourth respondent had taken them with to the petrol station.
- [6] Mtinto was contacted and gave a statement in Zulu to a security officer Mr Makhungu, who translated it into English and which Mtinto signed. He was then charged with being “found in possession of mine property (piece of rail) without authorisation nor waybill.” Before the disciplinary hearing he changed his statement and made a different statement relating to the events of the day. After a disciplinary hearing and an appeal he was dismissed.
- [7] Whereas Mtinto's first statement corroborated what his son had told the mine security and recorded that he did not realise it was an offence to take the rail that had been lying in his garden, the second statement essentially put the blame on his son. It included the following:

“On arrival I've confirm to the security the boy is indeed my son. I explain the whole story with regard to the piece of rail that last year February on my arrival to Skomplaas I found the very rail at the yard, so I don't know why my son take it to Embalenhle and why not reported it to me? The security told me that my son had reported everything to them and also they went to the place where the rail was

placed so as your son is not the employee of the company they will release him but I have to sign his statement on his behalf.”

[8] In other words Mtinto claimed the first statement was in fact his son's that he signed. However the content of the first statement as recorded by Mahkungu states inter alia that “...I loaded a piece of rail steel in my car that has been lying in my yard and drove with my son towards Embalenhle scrap yard”

[9] Mtinto's evidence at the arbitration is recorded as follows:

“He testified that he was in Embalenhle on the 24th of January and had left his car at home. When he came back he found his car at Boom 3 and was informed that his son and one unknown person had taken his car from his place.

He did not give a statement to the security officer, but was in fact told that to secure the release of his son; he had to sign a statement which was already prepared. Indeed after signing such statement, his son was released.

He confirmed that he did prepare another statement for the hearing as the statement that was prepared on the 24th its contents were not made known to him. This statement of the 24th was not even interpreted to him. He denied the contents of this statement.

In re-examination he gave indication that he had left his car keys at home and upon his return home, such keys were still at home.”

[10] The Commissioner cannot be faulted for finding that Mtinto was not a credible witness and he did not believe his testimony that someone was with his son. The Commissioner states that: “The applicant's testimony that someone was with his son cannot be believed. He did not even bother to ask about this other person. He did not bring his son to corroborate his version. The applicant was not a credible witness himself.”

[11] The following findings and omissions by the Commissioner are highlighted by the applicant in the review when it submits that the result of the Award is unreasonable

based on all the material before the Commissioner, as well as the Commissioner's own finding of guilt on the alleged misconduct:

- 11.1 That he recorded that the rails according to the company witnesses were going to fetch R117.00 at the salvage yard;
- 11.2 That he nonetheless found that no evidence was led that these rails had any economic value;
- 11.3 That despite the disciplinary charges laid by it the company could not have viewed the offence as serious as it did not refer the case to SAPS;
- 11.4 That having found that Mtinto had misappropriated the rails with the intention to sell them and that he lied at the arbitration, he nonetheless considered that corrective discipline was appropriate.

[12] I am in agreement with the applicant's submissions and reliance on *inter alia* the law as set out in *Sidumo*¹ that this Award stands to be reviewed. As was stated in that case:

"[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star* : Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

[13] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*² the SCA stated that: "...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."

¹ [2007] 12 BLLR 1097 (CC)

² (2013) 34 ILJ 2795 (SCA)

[14] The outcome of this Award is entirely disconnected from the evidence before the Commissioner and his own findings on the facts before him as well as on the credibility of the fourth respondent. I see no purpose in remitting the matter and make the following order:

Order:

1. The application for condonation for the late filing of the cross –review is dismissed.
2. The award under case number MP3154-11 is reviewed and set aside and substituted by the following:
“The dismissal of the fourth respondent Mr Daniel Mtinto was substantively fair.”
3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Webber Wentzel Attorneys

Respondent: M.E.S. Makinta Attorneys