



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR 2523-13

**In the matter between:**

**SIBANYE GOLD LIMITED (KLOOF DIVISION)**

**Applicant**

**and**

**JOSEPH DLAMINI**

**First Respondent**

**SIMON DUMISA MALINGA**

**Second Respondent**

**NUM**

**Third Respondent**

**CCMA**

**Fourth Respondent**

**THEMBA CEDA N.O.**

**Fifth Respondent**

**Heard: 9 February 2017**

**Delivered: 31 May 2017**

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**JUDGMENT**

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**WHITCHER J**

- [1] This is an opposed application to review and set aside the arbitration award issued by the Fifth Respondent<sup>1</sup>, and substituting the award with an order that the First and Second Respondents' dismissals were substantively fair; alternatively, remitting the matter to the CCMA for determination by a different commissioner (with costs).
- [2] At the arbitration, Mr S Khubeka, the Mining Manager, and Mr K Stead, the Senior Operations Manager testified on behalf of the Applicant. Mr Dlamini and Mr Malinga testified on their own behalf. On the instance of the Commissioner, on behalf of the employees, Mr Roodt, who had also been dismissed was called to the arbitration to give evidence.
- [3] The Applicant, with reference to the record of the proceedings set out in its pleadings and heads of argument the extensive evidence led at the arbitration. What follows and is applied, are summaries thereof where relevant.
- [4] The Applicant conducts mining operations on a two shift system i.e. dayshift from 05h00 to 15h00 and nightshift from 21h00 to 05h00. Malinga was employed as the Dayshift Miner and Dlamini as the Dayshift Supervisor for the working place in issue in this case. The mining operations commences with the dayshift, who are responsible, under the direction and supervision of a Dayshift Miner, for, amongst others, the installation of permanent support structures in the working place and blasting. After the working place has been blasted on dayshift, the nightshift employees enter the workplace to conduct cleaning operations i.e. they remove the blasted rock. The nightshift install temporary support but they are not responsible for the installation of permanent support. Dayshift Supervisors are statutory appointments in terms of the MHSA. A Dayshift supervisor is appointed for particular working areas. Each working place, in turn, is allocated to a Miner who reports to the Dayshift supervisor. It is the responsibility of the supervisor to ensure that the working places assigned to him comply with the applicant's safety standards, to visit each working place in his section within 2 days of a blast and other working places at least once a week, to satisfy himself (either by way of consultation

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<sup>1</sup> CCMA case number GAJB8848-12.

with the Miners appointed in the area or with personal inspections) that work is proceeding safely in accordance with the applicable rules.

- [5] On 5 September 2011, towards the end of the nightshift an accident occurred at a working place (“the working place”) which fell under the responsibility of Malinga and Dlamini during the dayshift. The accident resulted in the death of an employee.
- [6] Khubeka testified that an inspection *in loco* revealed that the working place was in a serious substandard condition. He described these substandards in detail and corroborated his evidence with reference to a surveyor’s diagram. Stead and Khubeka explained why the identified substandards constituted serious safety infractions which had contributed to the fall of ground.
- [7] Following the inspection, disciplinary proceedings were instituted against eight employees: Dlamini (the Dayshift Supervisor), Malinga (the Dayshift Miner), Roodt (the Dayshift Mine Overseer), the Nightshift Production Supervisor, the Acting Nightshift Production supervisor, the Nightshift Team Leader, the Nightshift Miner and the Nightshift Production Supervisor.
- [8] In summary, both Dlamini and Malinga were found guilty of failing to ensure that proper support structures were installed in the working place, more particularly that 47 elongates were missing and skeleton packs were not installed correctly, of failing to comply with the Mine Standard for mine steep stoping and failing to comply with the Mine’s special instructions that the panel face must be corrected and maintained in a straight line. Malinga was found guilty of failing to comply with the Mine Standard relating to operation of a scraper winch. The applicant extensively traversed all the charges in its evidence as follows.

*Failure by Malinga and Dlamini to install 47 (forty seven) elongates*

- [9] Elongates are permanent support units used to support the hanging walls which in turn stabilises the newly exposed ground after blasting. The Miner (Malinga) was responsible to mark the hanging wall to indicate where elongates are to be installed. It was the responsibility of Malinga and Dlamini

to ensure that elongates were installed in the working place in accordance with the applicable standards. A Rock Engineer's report dated 12 August 2011, approximately 3 (three) weeks prior to the fatal accident, recorded that *the elongate support was not installed as per mine standard* and instructed that this must be rectified. The instructions were noted by Malinga and Dlamini. Furthermore on 2 September 2011, 3 (three) days prior to the fatal accident, Dlamini recorded instructions in his logbook to install elongates. At the end of the shift, Malinga had confirmed that elongates had been installed as per the Applicant's standard.

- [10] On 5 September 2011, the inspection revealed that 47 elongates were missing. It was Dlamini's and Malinga's version that all elongates were installed but that the scraper winch used on the night shift took out the elongate support. It was put to them that this version is completely improbable in light of the fact that the elongates were missing – not broken or damaged, i.e. never installed. If the scraper winch used on night shift took out the 47 (forty seven) elongates, the damaged elongates would have been found in the working place after the fatal accident. Elongates are installed as the face advances, per blast. The fact that 47 elongates were missing indicates that 3 (three) to 4 (four) face advances occurred without any elongates being installed. Moreover, the appropriate elongate support is designed to support 20 (twenty) tonnes of weight. The portion of rock that fell down during the fall of ground which caused the fatality weighed approximately 5 (five) tonnes.

*Failure by Malinga and Dlamini to install skeleton packs*

- [11] Packs are permanent support used to support the hanging wall behind the face and to stabilize the immediate hanging wall beam which in turn stabilizes the newly exposed ground after blasting. The Rock Engineer's report recorded that *pack support above the cross-cut was not built as skeleton packs* and instructed Malinga and Dlamini to ensure that *skeleton packs built above the x/cut*. On 12 August 2013, approximately 3 (three) weeks prior to the fatal accident, Dlamini had given instructions to the crew (and specifically to Malinga) to install a skeleton pack in the working place. On 5 September

2011, the inspection revealed that the skeleton pack required above the cross-cut had not been built and installed.

*Failure by Malinga and Dlamini to comply with the standard for mine steep stoping*

- [12] It was the duty of Malinga and Dlamini to ensure that steep area controls are implemented to prevent any rocks from inadvertently falling or rolling down and striking employees walking or traveling in the gully. The inspection revealed that there were no steep stoping controls in place in the working place at the relevant portion of the gully and above the cross cut.

*Dlamini's failure to comply with instruction relating to face shape*

- [13] A risk assessment conducted in the working place on 23 May 2011, approximately three and a half months prior to the fatal accident, recorded that the face shape was not straight, and issued a special instruction to *correct and maintain the face shape*. If the face shape is not straight, it results in seismic stresses on the face, which could cause falls of ground. Both Dlamini and Malinga signed receipt of the special instruction. On 12 August 2011, the Rock Engineer's report recorded that the *panel face shape was [still] not straight* and instructed it to be rectified. It would have been rectified within 1 or 2 blasts. On 5 September 2011, when the fatal accident occurred, the panel face shape was still irregular.

*Malinga's failure to comply with the standard for operating a scraper winch*

- [14] A scraper winch is used for cleaning operations and is rigged to the hanging wall of the area being cleaned with ropes. The nightshift personnel rely on the drilled holes, made by the dayshift, to rig the scraper winch. The Dayshift Miner marks the position of the holes to be drilled. The inspection revealed that due to the irregular face shape, the scraper winch could not operate in a straight line resulting in Dlamini and Malinga "*making a plan*" and having intermediate and irregular holes drilled. In addition, after the end of the day shift, Malinga also failed to install the "*No Go Zone*" barrier.

[15] Clearly, in light of the above evidence, the Applicant substantiated all the charges levelled against Malinga and Dlamini. The Commissioner, however, did not explicitly make a finding in respect of each charge against each of them, or deal with each charge in a way that his findings in respect of each charge can be easily deduced from a perusal of the award. The Commissioner, instead, found that the Applicant failed to prove that Dlamini and Malinga were guilty of misconduct on the basis of the following defence advanced by the Respondents, that:

- (a) The fatal accident occurred during the nightshift and they cannot be held responsible for the accident as they worked on the dayshift.
- (b) The nightshift employees had deemed the working place safe enough to work in.
- (c) They had attempted to comply with the recommendations of the Rock Engineer's report but Khubeka had instructed them to continue with the blasting operations.
- (d) Malinga was under pressure in that he was responsible for 3 work places which were far apart.

[16] I agree with the Applicant that in failing to make a finding on each of the charges on the basis that Dlamini and Malinga cannot be held responsible for the accident as it had occurred on the nightshift, the Commissioner disregarded the following material evidence: (1) Dlamini and Malinga were not charged with causing the accident, but with failing to correct the substandards identified in the workplace where the accident had occurred, (2) the rectification of the substandards addressed in each of the charges fell within the responsibility of the dayshift, (3) the substandards in question contributed to the ground fall, and (4) the Applicant took disciplinary action against the entire supervisor team on dayshift and nightshift.

[17] In finding that Malinga was under pressure because he was responsible for 3 working places which were far apart, the Commissioner failed to appreciate that on raising a particular defence, an evidentiary burden falls on the employee to establish that his version is more likely. If the Commissioner had properly appreciated this evidentiary rule, he would have found that all

Malinga had offered were unsubstantiated assertions. He failed to disprove Khubeka and Stead's testimony that the distances between the working places could be covered without undue exertions because the cross cuts, connecting the working places, are next to each other and that Malinga could have visited all his sites within 40 minutes. Roodt confirmed that a miner could be appointed for more than one working area provided that he could visit the working places within 40 minutes. At no stage did Roodt categorically or with substantiating factors testify that it would have been impossible for Malinga to attend the workings areas in the time periods and manner asserted by Khubeka and Stead. Roodt also conceded that he had appointed Malinga for the working places. In addition, it was confirmed by Mr Stead that Mlinga had team leaders to assist him in the carrying out of his duties, which enabled him to fulfil his duties pertaining to the workplaces. In any event, even if Malinga did not have Team Leaders to his disposal, Malinga was trained as a Panel Miner, which means that he was trained to supervise a working place without any Team Leaders. Malinga was therefore trained to operate his crew and give the necessary instructions without any Team Leaders.

- [18] In any event, as submitted by the Applicant, at best for Malinga, a correct finding that he was overworked in his capacity as a Miner was relevant to sanction and not to the issue of whether he was guilty of the charges levelled against him.
- [19] In finding that the nightshift employees deemed the working place sufficiently safe to work in, the Commissioner failed to take into account that the inspection revealed that the working area was not in fact safe. Moreover, the Applicant also took disciplinary action against the nightshift supervisory employees for not complying with safety standards.
- [20] In finding that the Respondents had attempted to comply with the recommendations of the Rock Engineer's report but Khubeka had instructed them to continue with the blasting operations, the Commissioner here again failed to appreciate that the evidentiary burden lay with the Respondents. If he had so appreciated, he would have been alive to the fact that this assertion was not reliably established by the Respondents.

[21] During Khubeka's cross-examination, it was put to him that he had instructed the Respondents to stop addressing the substandards identified in the reports and blast the (sub-standard) panel, and to that end, had promised them overalls. Khubeka admitted that the Respondents had raised the issue regarding overalls with him, and admitted that he would have discussed blasting of that panel with them. He, however, vehemently denied any suggestion that he had asked or instructed them to blast a panel that was sub-standard, or that he asked them to stop addressing the sub-standards identified by the rock engineer and risk assessment reports, and start blasting instead. The Applicant demonstrated that the allegation put to Khubeka lacked any degree of specificity or particularity and was then abandoned for the remainder of Khubeka's lengthy cross-examination.

[22] Roodt testified that he had stopped the workplace, and that Khubeka did not agree with his decision. The matter was escalated to Mr. Stead, who instructed Khubeka to do a risk assessment. Roodt and Mr. Stead then discussed how the workplace would be rectified. He testified that Mr. Stead was not satisfied with Roodt's suggested time frame for fixing the workplace. These allegations by Roodt were never put to Khubeka and Stead. In any event they do not add up to an allegation and proof that, on Khubeka's instructions, the correction of the substandards were stopped in favour of continued blasting operations. Even Roodt's hearsay allegations regarding a meeting Khubeka had with the Respondents did not indicate same.

[23] The Commissioner at the end of Roodt's testimony put the following to Roodt:

*"But just to establish one thing. It will appear that you insist that the accident may have occurred as a result of prioritizing production over the work conditions. Because you say management kept on pushing for production."*

[24] Mr Roodt testified as follows:

*"...yes it was difficult as the Manager: Operations, he also wanted his production. So it was a continued struggle to keep the workplace stopped and then the other side they wanted the workplace to produce, so over all, I think it was us miners, and from the other side, because of*

*the pressure for production. Management that was pushing for production.”*

- [25] As submitted by the Applicant there was no basis for the Commissioner's question because Roodt had never suggested prior thereto that the accident had occurred as a result of Khubeka or Stead prioritizing production. His answer further did not confirm the suggested allegation made in the Commissioner's question.
- [26] Had the Commissioner taken into account all the above evidence and considerations, he would in all probability have found that the Respondents were guilty of all the charges levelled against them and that they had not established any defence which discharged their guilty.
- [27] In light of the above, the decision of the Commissioner is *prima facie* unreasonable. The question is whether there is an evidentiary basis to displace the *prima facie* case of unreasonableness. In my view, there does not exist another evidentiary basis to displace the *prima facie* unreasonableness of the decision. The defence proffered had no sufficient reliable evidentiary basis to discharge the allegations in all of the charges levelled against the Respondent. Basically, on the evidence, the decision reached by the Commissioner was *incapable* of being reached by a reasonable arbitrator.
- [28] Finally, and relevant to the above, I agree with the applicant that the reliance of the Respondents on the DMR report is misplaced as it is a report of a different forum, with a wholly different task. The Applicant was entitled to independently investigate the conditions in the working area, and determine whether there had been a contravention of its workplace standards and instructions. Dlamini and Malinga were charged with failure to comply with the Applicant's standards, procedures and instructions. The mere fact that an employee's conduct or omission may not be viewed as a contravention of the MHSA, does not mean that the same employee is not guilty of contravening a standard or instruction from his/her employer.

[29] I do not consider that a cost order would be appropriate. The Respondents at the arbitration raised a defence which, if it had been established, would have been relevant to the outcome of the proceedings.

### **Order**

[30] The arbitration award issued by the Fifth Respondent is aside on review and substituted with an award that the dismissal of the First and Second Respondents was substantively fair.

[31] There is no order as to costs.

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**Whitcher J**

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv R Itzkin, instructed by Edward Nathan Sonnenbergs Inc

For the First, Second and Third Respondents: Mathobi Attorneys

Labour Court