



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1967/15

In the matter between:

NUM OBO J MOGOROSI

Applicant

and

CCMA

First Respondent

JW THEE N.O

Second Respondent

ERGO MINING (PTY) LTD

Third Respondent

Heard: 23 August 2017

Delivered: 19 September 2017

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to have an arbitration award issued by the second respondent ('the arbitrator') reviewed and set aside. In his award, the arbitrator

found that the applicant's dismissal by the third respondent for collusion in the attempted theft of gold-bearing material was fair.

- [2] The material facts are recorded in the arbitrator's award, and I do not intend to repeat them here. It is sufficient for present purposes to record that the applicant was employed as a general assistant in the third respondent's smelt house, where gold-bearing material is heated and liquid gold poured into moulds. The normal operating procedure is for the moulds to be tipped onto a steel plate. The gold ingot is recovered and the slag (which contains a high concentrate of gold) is deposited onto a slag tray, which is kept in a safe, with the gold ingots.
- [3] The third respondent's senior security officer, Jenner, testified that on 12 March 2015 he conducted a surprise inspection at the gold smelting house. He discovered pieces of gold hidden in a wash basin in the bathroom. After CCTV footage was viewed, the applicant was identified as having colluded with other employees in the smelt house (in particular Carlos Neyara) to remove and conceal the gold. He was dismissed on 8 April 2015. The applicant disputed the fairness of the dismissal, a dispute that was referred to an arbitration hearing by the arbitrator under the auspices of the first respondent, the CCMA.
- [4] In his award, the arbitrator identified four issues at stake. The first was the applicable rule relating to the methodology in the smelting process. That is not in issue in these proceedings, and I need say no more about it. The second and third issues, which are contested in these proceedings, respectively relate to whether the applicant could be said to have colluded in the attempt to steal gold and whether the gold discovered could be attributed to the applicant's behaviour. Fourthly, the role of security (and in particular an assertion that the gold had been 'planted') was the subject of a dispute in the proceedings under review, but was not pursued in the present proceedings.
- [5] After a review of the evidence, the arbitrator came to the following conclusion:
43. The respondent only relied on the evidence of Andre, its only witness. I find him to be a credible witness as he led evidence as what transpired and on his findings following the discovery of the gold in the kitchen. He was consistent as

he testified on the practices in the work place and consistently pointed out the deviations from existing practices. Let me turn to the question of the steel plate versus the cement platform. I have heard both parties' arguments during the hearing. I am not persuaded by the applicant's version that any area could be used. The video footage shows by demonstrating how the job was performed in the past in particular 31 January 2015. It clearly shows the link between the smelt pot, steel plate and the snag tray. Logic in the first place suggests that it makes absolute no sense to have the processes separated. Whether a work procedure was in place is a technical argument. On the evidence before me and my observations on the video a practice was established. In my view the methodology chosen on the day by the applicant and the co-employees were of their own making. I will deal with this in more detail.

44. Turning to the second question whether the applicant is guilty if the allegation, I carefully studied the movements of both the applicant and Carlos. On my observation something was clearly abnormal. To start with Carlos who is not charged in this case his demeanour is highly questionable. The video shows how he sweeps and kicks and throws something in an opposite direction of the tray. It further demonstrates how his movements and focus changes and how he and the applicant disappear from the work station and walked to the tea room. During the footage it shows how the security faces in the complete opposite direction whilst all activities were at play...

- [6] The arbitrator went on to find that on a balance of probabilities, the applicant had committed the misconduct with which he was charged and that dismissal was an appropriate sanction.
- [7] The grounds for review articulated in the founding affidavit relate to the evidence that served before the arbitrator and the arbitrator's assessment of it. In particular, the applicant contends that the evidence failed to establish any nexus between the evidence and the misconduct alleged.
- [8] The relevant legal principles are well-established. This court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an

unreasonable result. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). In other words, the test is two-staged. First, the applicant must establish a misconception of the nature of the enquiry or some misconduct or misdirection on the part of the arbitrator. If that is established, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

- [9] In the present instance, I am not persuaded that the applicant clears the first hurdle, i.e. that the arbitrator committed any reviewable irregularity in his assessment of the evidence. Even if he did, in my view, the outcome meets the reasonableness threshold. The charge against the applicant was collusion in gold theft. The applicant's defence was that he was not party to any collusion; he simply denied any knowledge of the concealed gold. Against that, is the evidence of Jenner. Jenner reviewed the video recording taken by the CCTV camera in the smelter. What it disclosed was that on the morning of 12 March 2015, Neyara cleaned the moulds, on the concrete floor. In terms of the applicable operating procedure, the moulds were supposed to be cleaned over a designated steel plate. Neyara cleaned a second mould, looked at the contents of the slag, and then threw an object toward the bunting wall. Neyara then took a spade with slag to the tray. Neyara and the applicant swept the area around the slag tray and appeared to be communicating while doing so. Neyara gestured with his broom in the direction in which he earlier threw an object. Neyara continued to pick through the slag, picked up an object with his right hand and picked up his broom. Neyara then moved the drum of the bunting wall where he threw the object earlier and took an object from behind a steel beam. He then proceeded to the kitchen, followed by the applicant. In essence, as disclosed by the quote from the award recorded above, the arbitrator took the view that the movements of

Neyara and the applicant was suspicious or, as he put it, 'something was clearly abnormal'. The nature of the applicant's engagement with Neyara in circumstances where the security official present had turned his back, and the fact that the applicant accompanied Neyara to tea room, demonstrated the applicant's collaboration with Neyara.

- [10] The arbitrator rejected the applicant's evidence as improbable, give the deviation from established work practices demonstrated by the CCTV footage and behaviour by Neyara and the applicant that he (the commissioner) regarded as suspicious. The arbitrator further took into account the credibility of the witnesses who had testified, and for the reasons that he advanced, made a credibility finding in favour of Jenner. As the pieces of gold were discovered a few hours later, the arbitrator found that the compelling inference was that Neyara retrieved the pieces of gold and hid them with the applicant's collusion.
- [11] The arbitrator was acutely aware of the manner in which that dispute should be determined, and aware of the fact that Jenner was the sole witness for the third respondent. Put another way, he was aware of the nature of the enquiry, and aware of the manner in which he was to resolve the dispute of fact that served before him. He did so having regard to the proper test, and proffered reasons that are rational and capable of justification having regard to the evidence as a whole. In these circumstances, I fail to appreciate on what basis it can be contended that there is no nexus between the evidence that served before the arbitrator and the finding of misconduct that he made. The applicant had failed to present a plausible version to the arbitrator and the evidence of his witnesses was of limited if any value.
- [12] In short, and bearing in mind the clear distinction between a review and an appeal, I am satisfied that the arbitrator identified the issue in dispute, understood the nature of the issue in dispute, dealt with the substantive merits of the dispute, and reached a decision that another decision-maker could reasonably have arrived at based on the evidence (see *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)). In particular, am not persuaded that

the arbitrator committed any irregularity or misdirection in his assessment of the evidence and in coming to the conclusion that he did. The application accordingly stands to be dismissed.

- [13] Finally, in relation to costs, the court has a discretion to make orders for costs according to the requirements of the law and fairness. In a seminal judgment in a dispute between the same parties more than 25 years ago, what was then the Appellate Division of the Supreme Court held that a fact of an ongoing collective bargaining relationship between parties was a relevant factor, as was the extent of any prejudice that might be caused to that relationship by any costs order (see *National Union of Mineworkers v East Rand Gold and Uranium Ltd* (1991) 12 ILJ 1221 (A)). That approach continues to be adopted by this court in the exercise of the discretion conferred on it by s 162 of the LRA. On that basis, I do not intend to make any order for costs.

I make the following order:

1. The application is dismissed.
2. There is no order as to costs

André van Niekerk
Judge

REPRESENTATION

FOR THE APPLICANT: Adv QM Dzimba, instructed by Mothobi Attorneys

FOR THE THIRD RESPONDENT: Adv E Rudolph, instructed by Mendelow Jacobs