



Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 858/15

In the matter between:

**HARMONY GOLD MINING
COMPANY LTD**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

Respondent

SETHETSO RALETOOANE (NO)

Respondent

MLAMBO GEORGE VALASHIYA

Respondent

Heard: 22 November 2017

Delivered: 05 December 2017

Summary: (Review – misdirection in resorting to credibility findings without assessing probabilities – failure to consider evidentiary weight to be attached to a version not put to employer’s witnesses - arbitrator ignoring relevant evidence materially affecting finding – substitution of finding)

JUDGMENT

LAGRANGE J

Background

- [1] The applicant ('Harmony') has applied to review an arbitration award in which the arbitrator determined that the third respondent's dismissal was procedurally fair but substantively unfair.
- [2] The third respondent, Mr G Valashiya ('Valashiya'), had been dismissed for attempted theft of possible gold bearing material (GBM) in the form of a black plastic bag weighing 1.4 kg containing sandy material and two cans of spray paint.
- [3] During the arbitration proceedings evidence was led by two security officers to the effect that the third respondent had tried to dispose of the items which he had been carrying in a white plastic bag containing his clothing and personal belongings. In summary, their account of the incident which occurred at approximately 03H45 on 31 July 2014 was encapsulated in the evidence in chief of the first of the two security officers who testified, Mr P Cossa ('Cossa'), who had many years of service in his job:

"We were doing a random search next to the exit point of block A. So at a certain time before that, 3:45 was a white guy who came out first. So we searched him after that we have searched him, we let him go to. So I can't remember that was after how many minutes but after a few minutes, Mr George Valashiya so he came out from his side of the hostel, he wanted to clock out there on the turnstile. So when he observed that we were standing outside so he started to be look suspicious, lighting his cigarette and starting to move backwards and I told ... [inaudible] that hey that man looks like he's going to run away then we clock, we use a card to clock inside, going inside of the hostel. So when he disappeared he was not running but, when we got inside of the hospital we saw that he was running then we also chased him up until we apprehended, actually before we apprehended him I saw him in possession of a white plastic bag trying to sort out something while he is running. So I was a little bit faster than him so when I was about to arrest him he took out a plastic bag place then he placed that plastic bag on top of the concrete slabs and then at the same time he took two tins and he throw them over the wall so the time he threw the out those turns, I just saw the two tins and I did not know what was inside on the tins then we searched that plastic bag and found that there

was a possible gold ... [inaudible] material then we told Mr Valashiya that he was under arrest for what we found in his possession. Then we took him I mean we took some photos then we took him in the van and went round using the same way we entered and next to the place where we arrested him ...[inaudible] so under the tree we saw some tins but they were scattered, it was not in the same place and we took photos before we could collect them and we showed the suspect everything that we were doing there, doing in front of the suspect then after that took the suspect together with the suspected GBM that was found in his possession. We went straight to the place where we weighed the GBM in his presence and we asked him to look at the reading of the scale and he also looked at that readings. Then we went together with him at the office where upon arrival we sealed the possible GBM in his presence and we also showed him the number of that seal which we have used then we start with the docket and statement and everything and then we took him to the police."

At this juncture, it should be mentioned in passing that Cossa gave this evidence without any apparent reference to a written statement he had made about the incident. His colleague, Mr D Wewege ('Wewege') did make reference to his own statement when giving his evidence in chief. There was also evidence adduced of the photographs referred to.

- [4] Valashiya's version was that he agreed that another white person was searched before he got to the gate, but when he got there he was told by Cossa that Cossa had received a call from underground alleging that he had taken something. He denied this and Cossa then searched him and found nothing but then walked away while Valashiya waited at the exit. He came back with two cans of spray paint, which Valashiya denied knowing about because he 'did not work outside the mine'. They then approached the tollgate and Valashiya explained to Wewege that Cossa had a grudge against him because Cossa never paid him for some meat which he had asked Valashiya to cut for him and Valashiya had kept a portion of Cossa's meat because Cossa would not pay him. According to Valashiya, the meat had been illicitly obtained from a van which had overturned in an accident. When Cossa returned from walking towards the mine they took him back to the mine and searched his locker and found nothing. He asked them what they wanted and they took him to the place where boots

were washed. However, before they got there they came across a plastic bag placed on some stones which seemed to contain some soil. Cossa said “Here is the gold” and Valashiya laughed at him.

- [5] In essence, his explanation is that he was deliberately framed by the two security officers, though he never offered an explanation why Wewege would have been complicit in such a conspiracy against him. He further denied having access to the spray paints at the workplace and maintained that the contents of the black plastic or bag which contained sandy material was not gold bearing material, which would have been wet and would have contained smaller stones and rocks if it had come from underground. When his representative questioned the two security officers, not even the semblance of his version was put to them. They were cross-examined solely on their own versions and Valashiya’s representative did not take the opportunity to test his very different version with either of them.
- [6] The arbitrator found that Harmony failed to prove on a balance of probabilities that Valashiya took or attempted to take the spray paints and the suspected GBM found in the black plastic bag. The arbitrator came to this conclusion based primarily on the following:
- 6.1 Cossa gave inconsistent evidence because on the one hand he said the plastic bag had been ‘placed’ on a concrete slab and on the other he said that the third respondent had ‘dropped’ the plastic bag. He also said on the one hand that the third respondent threw something over the wall and on the other said that he threw two spray paints over the wall. In the arbitrator’s reckoning, this demonstrated confusion on the part of Cossa.
- 6.2 Further, Cossa signed the minute of the disciplinary enquiry where it was recorded that he had seen the black plastic bag and the spray cans in Valashiya’s white plastic bag, but later claimed that the minutes had recorded his evidence incorrectly. The arbitrator was shocked that a security officer of his experience he could have signed the minutes without reading them. Accordingly he found Cossa’s evidence incredible and implausible.

6.3 Wewege was also inconsistent in that he testified that the applicant was the first employee to come out of the mine whereas his colleague said he was second one to be searched (the third respondent claimed that he was the second one to be searched). Wewege also only said that someone was seen to be behaving suspiciously near the old hostel change houses and not that the third respondent looked suspicious and ran away. He also said that Valashiya was searched by Cossa but when Cossa's evidence was put to him he changed his testimony and said that his colleague had searched the third respondent's plastic bag. He also changed his testimony about when he saw Cossa's statement.

- [7] The arbitrator concluded that the respondent's two witnesses were unreliable, not credible and inconsistent. He struggled to find them credible based on his observation of "their demeanour and the way they came across when giving their evidence". Their evidence was so contradictory "as if they were not at the same place at the same time" when the incident occurred. The applicant failed because it could not put up a plausible version on a balance of probabilities. The arbitrator made no findings at all about Valashiya's credibility.

Review

- [8] The grounds of review primarily relate to the arbitrator's evaluation of the evidence. Harmony claims that the arbitrator's approach to the evidence led him to ignore material evidence by asking the wrong questions which distorted his factual evaluation to such an extent that his findings were ones no reasonable arbitrator could have come to on the material before him.
- [9] For example, Harmony takes issue with the arbitrator's nit-picking dissection of whether Cossa was claiming that Valashiya 'placed' the black bag on the concrete slabs or 'dropped' it on them. Similarly, the arbitrator unreasonably professed to have great difficulty in grappling with the Cossa's description of Valashiya throwing 'something' over the wall at one point in his evidence and, at another point in his evidence, saying Valashiya threw two spray paint tins over the wall. The arbitrator

experienced an analogous difficulty with Cossa's evidence at the disciplinary enquiry that the black plastic bag and the spray paint tins were inside Valashiya's white plastic bag and the other evidence that Valashiya had removed the tins and black plastic bag from his white bag in an effort to dispose of them. In all these instances, only the most literal interpretation of Cossa's evidence, taken completely out of context, could artificially create the appearance of supposed irreconcilable tensions in the evidence. It is obvious that some of the supposed contradictions were simply different ways of describing the same conduct and that the use of different verbs was not material to the probative thrust of the evidence. If it was an issue in the case whether Valashiya had wilfully damaged company property negligently or wilfully by 'dropping' a fragile object as opposed to 'placing' it on concrete slabs, such differences could be highly material, but it was not relevant to the issue in this case, which was whether Valashiya had probably tried to get rid of the black plastic bag he had been carrying in his white bag by putting the black plastic bag on the concrete slabs.

- [10] Other apparent contradictions between Wewege's evidence and Cossa's account which the arbitrator made much of, on closer examination prove to be illusory. Thus, for example, the arbitrator notes that Wewege claims Cossa searched Valashiya, which contradicts Cossa's evidence that he never searched Valashiya. When all of Wewege's evidence is considered in context it ought to have been glaringly obvious to the arbitrator that he meant that Cossa never searched Valashiya's person, but only searched his white plastic bag and that occurred after Valashiya had tried to discard the suspect items that were in the bag.
- [11] The arbitrator sought justification for his approach based on making credibility findings in the Labour Court judgment in **Moodley v Illovo Gledhow & others**¹, in which the court held, *inter alia*, that:

"[21] Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which

¹ (2004) 25 ILJ 1462 (LC)

they came across. She was steeped in the atmosphere of the proceedings before her. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies (see *Rex v Dhlumayo* 1948 (2) SA 677 (A)).”

(emphasis added)

Once again the arbitrator appears to have been selective in what he chose to extract from the judgment, because the previous paragraph provides the actual basis on which the judge approached the issue in that case, viz:

“[20] I would sooner go with the view that the arbitrator determined both the credibility of the witnesses and the probabilities, together, in a manner that led her, faultlessly in my view, to the conclusion that the probabilities are such that the evidence of Logie must be preferred to the evidence of Moodley because Logie came across as a more credible witness than Moodley.”

What this passage makes clear is that the learned judge, Ntsebeza AJ, did not believe the arbitrator in that case had decided issues of credibility independently of the probabilities.

- [12] It is a matter of concern that the arbitrator in this case felt it necessary to invoke his privileged observation of the witnesses, which does not form part of the record, as an important justification for his findings on the probabilities without explaining what it was about their demeanour or manner which struck him so forcefully to warrant his disregard of their evidence. It is of equal concern that he felt no need to evaluate Valashiya's credibility at all. The fact he did not feel this was necessary could only have been justified if his observations of the behaviour of Cossa and Wewege was so revealing about their lack of integrity as witnesses that the value of their testimony was completely vitiated. It is indeed extraordinary that none of their apparently manifest limitations which were so striking for the arbitrator are reflected anywhere in the transcript, such as avoiding questions, being unnecessarily defensive or argumentative, altering versions during the course of evidence as difficulties with earlier versions are revealed, and the like.

[13] Credibility findings can be important, but it seems that sometimes the principles governing when recourse should be had to credibility findings are misunderstood. The principles set out in ***Stellenbosch Farmers' Winery Group Ltd and Another V Martell et Cie and Others***² should not be misconstrued to suggest that credibility findings are a necessary foundation of any judgment in proceedings where *viva voce* evidence is led. On the contrary, what the SCA emphasised in *SFW* is that, credibility findings are a tool to be used when a court is faced with irreconcilable versions and when the general evaluation of probabilities does not yield a result.³ The SCA expressed it thus:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence c of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof

² 2003 (1) SA 11 (SCA)

has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

What the analysis above makes clear observations of demeanour are merely one factor among many in assessing credibility and many factors bearing on credibility will be apparent from the transcript of evidence. It is also obvious that credibility findings based on observation of the witness are not the only or the first recourse in assessing credibility and even less so in evaluating probabilities. Adjudicators should be wary of making definitive credibility findings based on their supposed omniscient ability to detect unreliable evidence solely from observing a witness.

- [14] This case is an example of an arbitration in which the general evaluation of the internal plausibility of each of the versions and an evaluation of their relative probabilities was completely neglected by the arbitrator because of his misdirection in being over eager to make credibility findings based on immaterial and minor natural inconsistencies in testimony and his personal undisclosed observation of witnesses. This led him to ignore the fact that Wewege had no reason to corroborate Cossa, even if we ignore that he improperly took account of Valashiya's untested evidence of *mala fides* on Cossa's part. In argument, it was suggested that it was not necessary to put the reason why Valashiya believed Cossa had a grudge against him to either Cossa or Wewege because it had been set out in an earlier statement by Valashiya. However, an employer cannot assume an employee will rely on an earlier defence unless the employee indicates they will and it does not absolve an employee from challenging a witness's credibility under cross-examination based on evidence that the employee still intends to lead, by putting the gist of that evidence to the witness.⁴

⁴ See **Small v Smith 1954 (3) SA 434 (SWA)** at 438E-G

- [15] The arbitrator also failed to assess the inherent probabilities of Wewege and Cossa engaging and collaborating in the most elaborate plot to falsely implicate Valashiya by planting evidence in different places near the exit to the mine and then contriving to 'find' them and make up a story that he had tried to discard the items. Against that is the untested version of Valashiya that he had simply waited by the gate for Cossa to return from his walk on the premises and that they had gone to the extent of creating an elaborate diversion of searching his locker when they had already planted the items elsewhere which they sought to implicate him in the theft of.
- [16] Had he first evaluated the relative probabilities of each version, and the corroborative evidence of Wewege coupled with the fact that Valashiya's version was untested with either Cossa or Wewege, the arbitrator would have found it impossible to reasonably arrive at the conclusion that Harmony could not prove its case on a balance of probabilities. Given the nature of the misconduct which is attempted theft, there can be little doubt that dismissal was an appropriate sanction.
- [17] I appreciate that Valashiya was defending an award in his favour, and in the circumstances, it is appropriate both parties should carry their own costs.

Order

- [1] The arbitration award of the second respondent issued on 01 April 2015 under case number FSWK 29-15 is reviewed and set aside to the extent that the arbitrator found the third respondent's dismissal was substantively unfair and awarded relief in paragraphs [103] to [106] of the award.
- [2] The second respondent's finding that the third respondent's dismissal was substantively unfair is substituted with a finding that it was substantively fair.
- [3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

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THIRD RESPONDENT:

E Masombuka instructed by
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LABOUR COURT