



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1205/15

In the matter between:

HARMONY GOLDMINE COMPANY LIMITED

Applicant

and

COMMISSIONER MOHAMED RAFFEE N.O

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Second Respondent

**NATIONAL UNION OF MINE WORKERS OBO OF
SAM PUZI**

Third Respondent

Heard: 27 February 2018

Delivered: 08 May 2018

**Summary: Review application – cultural tradition of conflict resolution
cannot be used to justify a charge of misconduct.**

JUDGMENT

NKUTHA-NKONTWANA J

Introduction

- [1] In this application, the applicant ('Harmony Gold') seeks an order reviewing and setting aside the arbitration award issued by the first respondent ('the commissioner') on 26 May 2015 under case number GAJB 15464-14. The commissioner found that the dismissal of the applicant is unfair and ordered his reinstatement. The third respondent ('NUM') is opposing the relief sought by Harmony Gold.

Background

- [2] Harmony Gold, a mining company, accommodates its employees in the hostels. The hostels are the property of the mine and it is common cause that transgressions committed by employees within the premises of Harmony Gold are punishable in terms of the disciplinary code.
- [3] On Sunday, 27 October 2013, Mr Mxolisi Ndlele ('Mr Ndlele') was assaulted by Mr Nqaba Ndabeni ('Mr Ndabeni') at the hostel bar. His leg was fractured and hospitalised for seven days whilst receiving treatment. On 29 October 2013, he was visited by Mr Ndabeni in the company of Mr Sam Puzi ('Mr Puzi'), the dismissed employee represented by the third respondent ('NUM') in these proceedings, and Mr Popo and Mr Chezi. The purpose of the visit was to apologise for the assault. Mr Ndlele requested that the matter be discussed after his release from hospital.
- [4] On 4 November 2013, Mr Ndlele was released from hospital and he immediately reported the assault to the mine governor, Mr Vusi. The next day there was a meeting in Mr Vusi's office with Messrs Ndlele and Ndabeni. The assault was discussed with each given a chance to state the side of his story. Mr Vusi advised them to resolve the dispute and Mr Ndabeni to give him feedback.
- [5] The same day, 5 November 2013, Mr Ndabeni went to Mr Ndlele's room with his delegation (Messrs Chipa, Chezi and Popo) to ask for forgiveness in terms of the Mpondomise tradition. Mr Ndlele was with his uncle, Mr Samson

Mkhonjwa ('Mr Mkhonjwa'). The discussion led to Mr Ndabeni's offer of R2000.00 in compensation. That was rejected by the Ndlele delegation. Instead, Mr Mkhonjwa demanded R50 000.00. The negotiations continued on 10 and 11 November 2013 and the Mr Ndabeni delegation comprised of Messrs Puzi, Chipa and Chezi. A counter offer of R10 000.00 was made and finally R20 000.00. However, the negotiations collapsed as Mr Ndabeni had R10 000.00 to pay immediately, with an undertaking to pay the balance later. That was rejected by the Ndlele delegation.

- [6] On 14 November 2013, Messrs Ndlele and Mkhonjwa formally reported the assault incident and the ensuing negotiations. As a result, Harmony Gold instituted the disciplinary proceedings against Mr Puzi on charges of dishonesty and attempted bribery. He was found guilty and dismissed on 29 October 2013. The NUM successfully challenged his dismissal.

Grounds of Review

- [7] The ground of review relied upon by Harmony Gold are as follows:

- 7.1. The commissioner committed a gross irregularity as he took into account irrelevant consideration and found that the brawl took place outside working hours.
- 7.2. The commissioner misconstrued the nature of the enquiry as he was preoccupied with the fact that Messrs Ndlele and Mkhonjwa had mentioned to Mr Ndabeni and his delegation that it was not possible to agree to the resolution of the matter without a monetary compensation. The commissioner overemphasised the fact that Messrs Ndlele and Mkhonjwa were willing to accept the monetary compensation.
- 7.3. The commissioner ignored the critical expert evidence of Dr Ndima dealing with cultural tradition and compensation.

7.4. The commissioner came to an unreasonable finding by concluding that Harmony Gold applied discipline inconstantly.

[8] As a rule, failure by a commissioner to apply his or her mind to issues which are material to the determination of a case constitutes an irregularity. The test does not end there. Before an irregularity can result in the setting aside of the arbitration award, it must, in addition, reveal a misconception of the true enquiry or result in an unreasonable outcome.¹ In *Head of the Department of Education v Mofokeng*,² the Labour Appeal Court aptly said the following:

[30] The failure by an arbitrator to apply his or her mind to issue which are material to the determination of a case will usually be an irregularity. However, the [SCA] in *Herholdt* ... and this court in *Gold Fields* ... have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in the setting aside of the award. It must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...

[31] ... Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

... Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or

¹ See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 14 to 16 and *Department of Education v Mofokeng Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).

² *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); Subsequent to *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] ... To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result ...

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order'

Evaluation

[9] There are two critical questions that arise in the present case. The first one is whether, in a cultural diverse workplace, to what extent should the employer embrace employees' individual cultural norms and traditions? Secondly, would the practice of those cultural norms and traditions strip the employer its powers to manage discipline?

[10] The expert witnesses concurred on the existence of the African norms and tradition of conflict resolution and payment of compensation as a token of remorse. Also, Dr Ndima, Harmony Gold expert witness, correctly opined that the practice of traditions cannot be used to defeat the ends of justice or conceal a transgression. Dr Timothy Murithi ('Dr Murithi'), in his study on The

Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu,³ makes pertinent remarks:

'The Ubuntu Approach to Conflict Resolution and Reconciliation

Hence, how then were the principles of Ubuntu traditionally articulated and translated into practical peacemaking processes? Ubuntu societies maintained conflict resolution and reconciliation mechanisms which also served as institutions for maintaining law and order within society. These mechanisms pre-dated colonialism and continue to exist and function today (10, 11, 12). Ubuntu societies place a high value on communal life, and maintaining positive relations within the society is a collective task in which everyone is involved. A dispute between fellow members of a society is perceived not merely as a matter of curiosity with regards to the affairs of one's neighbor; in a very real sense an emerging conflict belongs to the whole community.

According to the notion of Ubuntu, each member of the community is linked to each of the disputants, be they victims or perpetrators. If everybody is willing to acknowledge this (that is, to accept the principles of Ubuntu), then people may either feel a sense of having been wronged, or a sense of responsibility for the wrong that has been committed. Due to this linkage, a law-breaking individual thus transforms his or her group into a lawbreaking group. In the same way a disputing individual transforms his or her group into a disputing group.

It therefore follows that if an individual is wronged, he or she may depend on the group to remedy the wrong, because in a sense the group has also been wronged. We can witness these dynamics of group identity and their impact on conflict situations across the world.

Ubuntu societies developed mechanisms for resolving disputes and promoting reconciliation with a view to healing past wrongs and maintaining social cohesion and harmony. Consensus building was

³ *The Journal of Pan African Studies*, vol. 1, no.4, June 2006

embraced as a cultural pillar with respect to the regulation and management of relationships between members of the community...

Depending on the nature of the disagreement or dispute, the conflict resolution process could take place at the level of the family, at the village level, between members of an ethnic group, or even between different ethnic nations situated in the same region.' (Emphasis added)

- [11] In the present case, it is common cause that Mr Ndabeni, accompanied by his delegation, sought to make peace with Mr Ndlele consequent to the assault incident in line with the Mpondomise or Mpondo tradition. In fact, it would seem that the discussion that ensued was sanctioned by the hostel governor, Mr Vusi, to whom the hostel bar brawl had been reported.
- [12] Indeed, the commissioner correctly took into consideration that during the first meeting on 5 November 2013, the Ndabeni delegation did not offer compensation. It was the Ndlele delegation who introduced the issue of compensation. As a result, Mr Ndabeni offered R2000.00 which was rejected. Mr Mkhonjwa mentioned a figure of R50 000.00. In essence, the Ndabeni delegation wanted to apologise and make peace with Mr Ndlele. To extent that compensation was requested, they were willing to pay it as a token of remorse.
- [13] It is common cause that the discussion that ensued on the amount of compensation was clearly triggered by the Ndlele delegation. Clearly, the commissioner correctly took into account the concession by Mr Mkhonjwa that, had the amount of R50 000.00 been paid, he would have accepted it and, most probably, would not have reported the incident. The concession was fatal to Harmony Gold's case of dishonesty and attempted bribery. To my mind, the compensation was offered within the context of negotiations, a normal turn of events in terms of the African norms and tradition of conflict resolution as confirmed by the expert witnesses.

- [14] Harmony Gold sought to water down the effect of the above evidence. It argued that even if Messrs Ndlele and Mr Mkhonjwa were willing to accept the compensation, it could only mean that they were equally guilty of misconduct as a result of participating in the concealment of the serious incident of assault. Well, if that was the case, then Harmony Gold has a huddle of inconsistent application of discipline to deal with. Messrs Ndlele and Mr Mkhonjwa were allowed to get away with murder.
- [15] Another impugn by Harmony Gold is that the commissioner ignored the evidence that the offer of compensation was aimed at ensuring that the incident that led to Mr Ndlele's assault was not reported to its relevant authorities. That is not true. The commissioner did consider the common cause evidence that the assault incident had been reported to Mr Vusi, the hostel governor. Mr Khoza, for Harmony Gold, argued that Mr Vusi was not part of the mine authorities and the incident was never reported formally. This argument is devoid of merit.
- [16] It would be absurd to have a situation where the Harmony Gold rules of conduct and discipline are extended to the hostels but the hostel governing officials are excluded from the enforcement thereof. Mr Vusi was not only aware of the assault incident, he even called Messrs Ndlele and Ndabeni to a meeting. Nonetheless, even if the incident had not been reported, the compensation offer was a legitimate gesture as Mr Ndabeni showed that he was truly remorseful and had a desire to put the matter to rest.
- [17] It is clear that Harmony Gold seriously misconstrued the African tradition of peace-making hence it vigorously pursued the individual members of Mr Ndabeni's delegation. Dr Ndima testified that The Ubuntu is at heart in this tradition. As expounded by Dr Murithi, the collective intervention is the core of peace-making. As such, the participation of the community members in order to facilitate a resolution of a dispute would not turn them into accomplices to the transgression or be viewed as defeating the ends of justice.

- [18] Even though employers may not be bound by the cultural traditions, they cannot simply ignore the reality of their existence, especially in instances where the cultural traditions are aimed at achieving societal good and are not in conflict with the Constitution. In instances, as typified in the present case, where the perpetrator showed true remorse and was willing to promote peace with the victim in accordance with their norms and traditions, the employer would be expected to earnestly consider same in good light.
- [19] Lastly, it is true, as contended by Harmony Gold, that the commissioner was erroneous in his finding that, since the incident took place on a Sunday and outside working hours, the disciplinary code was not applicable. However, it is immaterial in the big scheme of events. I agree with third respondent that the commissioner proceeded to deal with the pertinent issues and produced a reasonable outcome.

Condonation

- [20] There is also an issue of condonation. Harmony Gold applied for the date for the hearing of this matter 33 days late. The application for condonation is also opposed by the third respondent. I am satisfied that the explanation proffered for the delay is reasonable and the extent of lateness is negligible. There is no prejudice to the third respondent occasioned by the delay. The indulgence sought is granted accordingly.

Conclusion

- [21] In all the circumstances, I have no reason to interfere with the finding of the commissioner that the dismissal of Mr Puzi is substantive unfair. Given the collective bargaining relationship between the parties, it would not be just and fair to award costs.

- [22] In the premises, I make the following order:

Order

1. The application is dismissed with no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr M Khoza

From: Edward Nathan Sonnenbergs

For the respondent: Mr T Sethosa

Instructed by: MS Molebaloa Attorneys