



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR971/16

In the matter between:

SIBANYE GOLD LIMITED

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSONER THEMA CEDA

Second Respondent

AMCU obo SITHOLE MANLENKOSI

Third Respondent

Date heard: 17 October 2018

Delivered: 4 December 2018

JUDGMENT

RABKIN-NAICKER, J

- [1] This is an opposed application to review an arbitration award under case number GAJB 17612-15. In terms of the Award, the dismissal of the third respondent, Sithole Manlenkosi (Sithole) was found to be substantively unfair. He was retrospectively reinstated to the date of his dismissal. The applicant, Sibanye Gold Limited (Sibanye) was ordered to pay Sithole back-pay amounting to R89 947.48 on or before 30 April 2016.
- [2] Sithole was employed by Sibanye for 28 years. At the date of his dismissal he was employed as a bell ringer at level 24 and was earning R6 842.16 a month. He was dismissed for his alleged involvement in assisting illegal miners on 22 December 2015. His dismissal was in the wake of a discovery of the body of an illegal miner hanging from the top of a skip.
- [3] The record relied on by the applicant consists of the following: a short portion of a transcribed record (which from references in the transcribed record was in excess of 65 pages) and a portion of the Commissioners typed notes. Although reference to a bundle of documents was made in the practice note, the bundle was not before Court. The applicant set out averments in its founding affidavit relating to its investigation into the death of the illegal miner and an inspection *in loco*. However, this Court must consider the review on the basis of the evidence contained in the record before the arbitrator.¹ The applicant took a risk by failing to file the documentary record or was simply negligent in not doing so. There was no explanation given for the failure to file the documentary evidence referred to in the transcript. Nor did the applicant seek to have the matter sent back to arbitration on the basis that the review record was incomplete.
- [4] In its heads of argument, the applicant submits that its review application is based on five grounds: that the Commissioner disregarded material evidence; that he failed to place appropriate reliance on the uncontested evidence, when this should have been relevant to the weighing of probabilities; that the

¹ This is not a case in which the Labour Court is faced with a review application where the record of the arbitration proceedings sought to be reviewed has gone missing, and there has been no proper attempt to reconstruct it as in *Baloyi v Member of the Executive Committee for Health & Social Development, Limpopo and others* (2016) 37 ILJ 549 (CC).

Commissioner made a material error of fact; that the Commissioner failed to apply his mind properly to the matter that was before him. None of these submissions references the record. Reliance for these grounds is placed solely on the factual averments contained in the founding affidavit as well as reference to the Award. The supplementary affidavit and heads of argument similarly makes no reference to the record of the arbitration proceedings.

- [5] In the Award, the Commissioner records the following, *inter alia*, in his analysis of the evidence before him:

“It was common cause that the applicant was dismissed for allegedly assisting an illegal miner to gain access to the underground at shaft no 1. The applicant disputed providing assistance to the illegal miner.

However no evidence was presented either directly or indirectly by the respondent linking the applicant to the alleged misconduct. The basis for his dismissal was solely based on a tip-off or information conveyed by an informer. In spite of the fact that the informer did not file any statement he was also not called to testify.

Initially the respondent stated that the informer would testify in camera. However the respondent at the later stage said the informer would no longer be testifying given the fact that he feared for his life.

Hearsay evidence was general excluded (sic) since it was unreliable especially in case where the person who has the personal information about the facts pertaining to the allegation did not appear to tell the forum about what he observed or knew.

The respondent's first witness testified he received information from the informer and this means that he heard from the informer. He did not have personal knowledge of what he was told by the informer. The truthfulness and accuracy of the allegations of this witness giving the hearsay could therefore not be tested. Moreover this witness was not even on the scene when the accident occurred. He was called and informed about what had transpired.

However what the second witness of the respondent said was extremely crucial in this regard. Gideon Petrus Greyling testified that security officers working on the shift were interviewed and no information could be found as to how the illegal miners gain access into the mine shaft. This assertion by Greyling served to illustrate that the respondent's case was based on mere speculation.

There was nothing that could be deduced from the respondent's third witness, Jan Hendrik Du Plooy to confirm whether the applicant assisted the illegal miners to gain entry to the shaft except to testify that he was requested to assist with the investigations to determine the possibility that unauthorized persons could use the skip to gain access underground.

The fundamental issue for determination was not whether it was possible for illegal miners to use the skip as the mode of transport to gain entry underground. It was common cause that the skip was used hence the illegal miner's body was found on top of it.

The critical issue in question was whether the applicant assisted in this regard the illegal miner. The alleged assistance could not be entirely based on mere speculation and the respondent's witnesses' opinions on whether the skip could be utilised or that the applicant provided assistance...."

- [6] In essence, the Commissioner gave no weight to the employer's evidence. In relation to the hearsay evidence i.e. that an informer told one of the company witnesses that Sithole was involved in assisting illegal miners, he was correct in his treatment of it.² A look at the transcribed record, such as it is, supports the Commissioner's decision in this matter. Mr du Plooy, the supervisor boilermaker, conceded that he did not know the time of the night shift worked

² See *Heese obo Peters v Road Accident Fund* 2012 (6) SA 496 (WCC) at para 57, where it was stated:

'Insofar as the objection is based on the hearsay rule, it is necessary to have regard to the definition and scope of hearsay evidence. In *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 (PC) it was formulated as follows:

'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made.'

by Sithole on the night in question. He also agreed that he did not know when the incident actually happened. He further stated that he could not say whether Sithole helped the illegal miner or not. It was also common cause from the transcribed record that an illegal miner could gain entry to the shaft through the ventilation shaft and the fence around the bank area, and that the lock which allowed access from the skip to the platform was not in working order.

[7] Sithole testified that when he was loading the skip in question he did not look up. It was only when the skip was ascending that he did look up to watch its progress. At this stage he saw something hanging from the top of the skip and immediately alerted the bell ringer on level three. He instructed him to check what was on top of the skip. When he did not respond, he called him again. He asked him what was on top of the skip and was told that it was a person. He was subjected to a polygraph test and was then told that he was working with the illegal miners. However, there was no evidence given about the polygraph test at the arbitration.

[8] In all the above circumstances, with due regard to the jurisprudence of the Labour Courts, and my consideration of the record filed by the applicant in this matter, I am satisfied that the Award is not susceptible to review. There was no explanation by the applicant as to why the bundle of documents used at the arbitration were not before me. I take this into consideration in making a costs order in this matter.

[9] I make the following order:

Order

1. The review application is dismissed.
2. The applicant to pay the costs.

H. Rabkin-Naicker
Judge of the Labour Court of South Africa

Appearances:

Applicant: Solomon Holmes Attorneys
(Heads of Argument drafted by Adv ZM Navsa)

Third Respondent: C Malan

Instructed by: Larry Dave Attorneys