THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: JR1914/22

In the matter between:

SIBANYE GOLD PROTECTION SERVICE LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
XAMESI N.O.	**Second Respondent**
NATIONAL UNION OF MINES (OBO MAFUNA A)	**Third Respondent**

Heard: **26 November 2024**
Delivered: **14 January 2025**

JUDGMENT

NONDWANGU, AJ

Introduction

[1] The applicant, Sibanye Gold Protection Security Services Limited (Sibanye Gold or the applicant), has launched an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitrator's award handed down on 20 July 2022 by the second respondent under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The second respondent (or the commissioner) had found the dismissal of the individual third respondent (or Mafuna) to be substantively unfair and ordered the applicant to reinstate Mafuna retrospectively and to pay him backpay equalling thirteen months' salary within the stated period. The commissioner further ordered the applicant to issue a written warning valid for a period of three months for the misconduct relating to the neglect of duties.

The background facts

[2] Sibanye Gold is a subsidiary to Sibanye Stillwater and it had employed the third respondent, Mr Albert Mafuna, in various positions for a period of 35 years but at the time of his dismissal he was occupying the position of security supervisor for a period of 11 years.

[3] It is common cause that on or during 07 January 2020 Mafuna had posted three groups of his subordinates to attend to an arrest of illegal miners coming out of shaft 2 at the mine. The illegal miners were arrested and there were bags seized from them by Mafuna and his team as they are responsible for the security of the mine.

[4] Subsequent to the arrest of the illegal miners and whilst on their way to the surface or on the surface, Mafuna took a bag from one of his team members, Sefuthi, and placed such at the security office. The bag was left unattended as he went back with one of the team members, Mametsa, to the shaft where he had been

[1] No. 66 of 1995, as amended.

called again. He then found a bag or glove which he took with when he went to the rest of the team at the plant.

[5] There is a dispute between the parties on the number of the amalgams balls which were in possession of Mafuna. The applicant's version was that Mafuna had shown them four amalgam balls and the bag which was left at the security office had two amalgam balls whereas Mafuna asserts that there were two amalgam balls found at the cage and the other two from the bag which was left at the security office.

[6] Again, Mafuna had made a statement where he recorded that there were two bags seized during the operation and one was seized from the illegal miners and another one at the shaft. According to the initial statement by Mafuna, each bag seized had four (4) amalgam balls (or gold balls) but it appears that Mafuna changed his version during the investigation and recorded that the bag found from the illegal miners and left at the security office had two (2) amalgams balls whereas the second one found at the cage had two (2) amalgams.

[7] Mafuna was then charged with gross neglect of duty in that he contravened the search and seizure processes at work or that he failed to exercise control in respect of the evidence seized from the illegal miners. The other charge related to dishonesty in that he failed to declare the correct number of the amalgam balls seized from the illegal miners. The third charge was unauthorised removal of company property and lastly, gross dishonesty in respect of the fact that Mafuna had not reported the alleged violations relating to the mishandling of the evidence seized from the illegal miners.

[8] Pursuant to a disciplinary enquiry, Mafuna was found guilty of the charges preferred and after a consideration of aggravating and extenuating circumstances, the chairperson of the enquiry recommended the dismissal of Mafuna. Axiomatically, Mafuna was dismissed on 12 June 2021. Mafuna challenged the dismissal by referring a dismissal dispute to the CCMA for an alleged unfair dismissal. The commissioner found the dismissal of Mafuna to be unfair and ordered, amongst others, reinstatement of Mafuna. Sibanye Gold being dissatisfied with the award launched these proceedings and Mafuna is opposing this application.

Grounds for Review

[9] Sibanye Gold contends that the commissioner has found Mafuna guilty of negligence despite Mafuna being charged with gross negligence and this notwithstanding that no attempt was made by the commissioner to distinguish between ordinary and gross negligence. Further that the commissioner proffers no reasons why Mafuna's conduct was found to be ordinary negligence as opposed to gross negligence.

[10] To amplify the assertion that Mafuna was supposed to be found guilty of gross negligence, Sibanye Gold submits that Mafuna has been employed as a security officer for 36 years of which 11 years in a managerial position. Mafuna had the responsibility to uphold the laws of the country and to protect the company from risk by preventing, detecting and combatting criminal activities directed at its employees and property. He further had to ensure that the property seized from any illegal activities remain in his control and always in his sight.

[11] Mafuna has also failed to deal with the seized items by observing the chain of evidence contemplated in the search and seizure policy. In as far as dishonesty is concerned, Sibanye Gold further contends that the commissioner's finding on dishonesty is unreasonable considering that Mafuna had showed his team members four amalgam balls at the plant and in his version, the bag which he took from one of his team members, Sefuthi, had two other amalgams.

[12] Therefore, at the very least there were more than 4 amalgam balls yet Mafuna had declared only four amalgam balls from the two bags seized. Lastly that Mafuna was derelict of his duties when dealing with the bags of amalgams and thus, he should have been dismissed.

Evaluation

[13] It is trite that when a commissioner arbitrates a dismissal dispute relating to misconduct, such a commissioner must first establish whether the dismissed

employee was indeed guilty of the misconduct that led to his or her dismissal and secondly, determine whether dismissal as a sanction is an appropriate and fair sanction for the misconduct committed.

[14] It is common cause that Mafuna has been dismissed and in terms of section 185 of the LRA every employee has a right not to be unfairly dismissed. Section 188 (1) (a) (i) a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the basis of such a dismissal is for a fair reason relating to the misconduct committed by the employee. Section 192 (2) places an obligation on the employer to prove that the dismissal effected is fair.

[15] In *Bidvest Steiner v Commissioner Lourens NO and Others*[2] the court held that:

> "In any dismissal, what an employer is obligated to prove is a fair reason for the dismissal it effected. A reason is fair if it is related to the conduct of an employee. Therefore, in an instance where an employee faces a barrage of allegations of misconduct, all an employer is required to do is to prove one of the many allegations that may have been raised which questions the conduct of an employees.

[16] The question, therefore, is whether Sibanye Gold has tendered evidence before the commissioner which proves one of the many allegations raised with the employee. In this case, it is common cause that the commissioner has found in paragraph 49 that:

> "it was evident that the Applicant (Mafuna) did not conduct a proper handover when he left a bag of amalgam in the security office before, he could attend to a lead of another amalgam left in the cage by the illegal miners. Firstly, in his own evidence he testified that he left the bag in the office which meant that there was no hand over to Kaizer. Secondly, he said he called Kaizer whilst he was in the textile and told him that he left a bag at the security office, clearly

[2] (JR2614/19) [2023] ZALCJHB 168 (23 May 2023) at para 7.

this was not a handover but a message in passing. Thirdly, the applicant (Mafuna) did not dispute the handover procedure which was articulated by witnesses of the respondent (Sibanye Gold). In addition, Kaizer disputed having been handed over a bag of amalgam when he left it (at) the security office. On the basis of the above, I accepted that the applicant was neglect".

[17] It is quite plain that not only did Sibanye Gold succeed in proving that Mafuna was derelict of his duties in as far as the handling of the evidence seized from the illegal miners but he, himself, had admitted to such a dereliction of duties during his testimony.

[18] Therefore, on the construct of the provisions of section 188(1)(a)(i) of the LRA there is a fair reason relating to Mafuna's conduct of gross neglect of duties and on that basis alone, dismissal must be fair.

[19] However, if one accepts that the commissioner had found the conduct of Mafuna to be in neglect of his duties, the commissioner should have considered the question of whether there is a fair reason to dismiss Mafuna and as the learned Moshoana J held in the *Steiner* case,[3] the aforesaid question is different from the question whether dismissal as a sanction is appropriate or not.

[20] Further, the Constitutional Court in matter of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[4] held that:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct,

[3] At Para 11 of the judgment
[4] [2007] 12 BLLR 1097 (CC) at para 78.

whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

[21] First of all, commissioner has failed to provide reasons why dismissal effected by Sibanye Gold was inappropriate in the circumstances where Mafuna had committed serious misconduct relating to derelict of duties. The fact that the commissioner has failed to provide reasons why dismissal was inappropriate indicates that he did not consider such an issue and instead he chose to apply progressive discipline in the circumstances where section 188 clearly provides that where there is a fair reason relating to the conduct, fairness exists.

[22] Secondly, it is trite that commissioners cannot interfere with the sanction of the employer unless such a dismissal is unfair. In this case, the commissioner has interfered with the employer's sanction of dismissal in the circumstances where he found that Mafuna has been derelict of his duties. Thus, a fair reason for Mafuna's dismissal exists and the commissioner has committed an irregularity in this regard.

[23] Thirdly, the commissioner has re – labelled the misconduct preferred by Sibanye Gold against Mafuna as 'ordinary neglect' as opposed to gross neglect and the court has held in the *Steiner* case that:

"the fact that Steiner through Mynhardt labelled the failures as gross negligence is of no moment. This point was a reaffirmed by the Labour Appeal Court (LAC) in its judgement of Cape Gate (Pty) LTD v Mokgara and Others.[5] In a more emphatic terms, the erudite Tokota AJA, writing for the majority writing for the majority had the following to say:

[21] … it is sufficient if the employee is informed of the allegations against him to prepare for the hearing. What is necessary is that sufficient particulars of the charges preferred against an employee, which must be covered in the rules of conduct of the company concerned must be alleged.

[5] (2022 43 ILJ 1277 (LAC).

> [22] … it is not about proving all the elements of an offence. <u>All what is required is to prove the essential allegations which form the basis of the misconduct concerned</u>."

[24] From the aforementioned case, it is rather plain that the commissioner's relabelling of misconduct from 'gross neglect of duties' to ordinary neglect of duties is irrelevant because the question is whether there is a fair reason justifying the dismissal and as already demonstrated herein, such reason exists.

[25] The matter of *Sidumo* sets out the process which the commissioner ought to follow when determining whether the sanction imposed by the employer is fair and amongst others, the commissioner has to take into account the totality of circumstances.[6]

[26] In this matter, the commissioner found that Mafuna is guilty of neglect of duties and despite this finding, he proceeded to find that dismissal was not an appropriate sanction. Consequently, there is a misalignment between the finding and the sanction imposed.

[27] The commissioner has failed to take into consideration the fact that Mafuna's position in that he is a senior officer given that he is a security supervisor. This position is of trust and there is a certain level of care required of the person holding the position. Further that Mafuna had the obligation to ensure that all processes of Sibanye Gold are followed when search an seizures are conducted and where there is evidence seized, the chain of evidence is not to be broken.

[28] The commissioner also failed to consider the fact that Mafuna was well aware of the consequences of not handling the evidence seized from the illegal miners and this much is clear from the time when Mafuna was addressing his subordinates regarding the bag which was supposedly missing. His emphasis was that if that bag is not found, someone would be expelled.

---

[6] Sidumo at para 78.

[29] The commissioner also does not consider the fact that Mafuna does not provide an explanation for his failure to adhere to the processes and this is notwithstanding the fact that he occupies a position of trust and has to lead by example.

[30] In light of the above, it is apparent that the commissioner has failed to properly assess the appropriateness of the sanction imposed. Had he done so, he would have arrived at a conclusion that the dismissal of Mafuna was fair.

[31] In the result, the outcome the commissioner arrived at cannot be reasonable and his decision does not fall within a range of possible justifiable decisions that could be reached based on the facts before him. Therefore, the commissioner committed a reviewable irregularity, and his award stands to be set aside.

[32] Based on the material before me, I do not deem it fit to remit the dispute to the first respondent for arbitration *de novo*. On the evidence which was placed before the commissioner and now before this court, it is apparent that the dismissal of Mafuna was substantively fair.

[30] I interpose the fact that the commissioner's findings on whether Mafuna was dishonest by not declaring the correct amount of amalgam balls cannot be faulted when regard is had to the fact that the charge refers to non - declaration of the 'correct' amount of amalgam balls. The commissioner has found that Sibanye has not established what the 'correct' amount of amalgam balls is (or was) so as it can be determined whether Mafuna has committed the alleged misconduct.

[31] In any event, the evidence of Sibanye Gold's witnesses was not consistent in that Sefuthi testified that Mafuna took (or grabbed) the bag from her and placed it at the security office. She did not see what was in the bag and the only thing she could testify on is the fact that Mafuna had four amalgams balls when he came at the plant. According to Jali Mafuna was holding four amalgam balls at the plant and he later saw two more amalgam balls. Gerhardt testified that there was supposed to be eight amalgam balls and this is based on the interpretation of Mafuna's statements.

[32] So, Sibanye Gold could not establish what the so called 'correct' number of the amalgam balls were and their witnesses suggested that the amalgam balls could have been 4, 6 or 8 whereas Mafuna testified that four amalgam balls were seized. Two were found from the glove at the cage and two from the bag grabbed from Sefuthi. On the probabilities, there were 4 amalgam balls as not only Sefuthi and Jali has seen at least 4 amalgam balls which is in line with the version of Mafuna. In the result, Sibanye could not establish any form of dishonesty on the part of Mafuna in respect of the 'correct' amalgams declared.

[33] With regard to costs, the Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[7], that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[34] Accordingly, the following order is made:

Order

1. The arbitration award issued by the commissioner acting under the auspices of the first respondent dated 20 July 2022 under case reference number GAJB 18598/202 is reviewed, set aside and substituted with the following order:
2. The dismissal of Mafuna (cited herein as the third respondent) is substantively fair.
3. There is no order as to costs.

Nondwangu AJ

Appearances:

For the Applicant:	Adv Victor Mndebele
Instructed by:	Solomon Holmes Attorneys

[7] (2018) 39 ILJ 523 (CC).

For the Third Respondent:	Rhoda Makgamatha
Instructed by:	Cheadle Thompson & Hayson Inc