THE LABOUR COURT OF SOUTH AFRICA
AT JOHANNESBURG

Not Reportable/Of interest to other judges

Case no: JR 637/2023

In the matter between:

SIBANYE GOLD PROTECTION SERVICE LTD	**Applicant**
and	
COMMISSION OF CONCILIATION, MEDIATIOIN AND ARBITRATION	**First Respondent**
COMMISSIONER NEGOVHELA, L (*N.O.*)	**Second Respondent**
NUM obo NJANI, N	**Third Respondent**

Heard: 5 March 2025
Delivered: 27 March 2025
Summary: (Application for review – arbitration award – dismissal for misconduct – Arbitrator's failure to weigh up conflicting versions – evaluation of evidence perfunctory – Award set aside)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application to review and set aside an arbitration award in which the arbitrator found that the applicant, Sibanye Gold Protection Services ('SGPS'), had failed to prove that that the third respondent, Ms N Njani ('Njani'), was guilty of sleeping on duty, for which she had been dismissed. Accordingly, the arbitrator found she had been unfairly dismissed and reinstated her retrospectively to the date of her dismissal. The procedural fairness of the dismissal was not in dispute.

Background

[2] Njani had been charged with *"Sleeping on duty in that on the 10th February 2022, at plus minus 00:31, at Thuthukani Shaft Bank, you were found sleeping inside the guard house with the lights switched off and placed the chair against the door."*

[3] On the night in question, Njani was on duty. The guard house was next to turnstiles which granted pedestrian access to the shaft area. At the particular shaft, equipment could enter the mine and there was evidence that illegal miners sometimes hid in vehicles entering the mine and smuggled supplies underground using that shaft.

[4] Njani denied she was asleep. The security supervisor, Mr D Du Plessis ('Du Plessis') claimed he had found her sleeping on a chair, which was placed with against the door in the guard house with back of the chair against the door. He testified he took a photograph of Njani while she was asleep and blurry versions of a photograph depicting someone seated in a chair were presented in evidence. His version was that he had to wake her. Her version was that she was awake and had already seen him entering the security area when he came through the turnstile before he got to the guard house. She denied the person in the photograph was her.

The award

[5] The arbitrator set out the evidence in summary. He rejected Njani's claim that she had been inconsistently treated by comparison with three other employees because he accepted SGPS's explanation for the apparent inconsistent treatment as a fair and acceptable explanation why those employees had not been dismissed.

[6] Somewhat carelessly, the arbitrator erroneously included passages assessing the evidence of witnesses from another award. When he did turn to the case at hand, he found that:

6.1 the case was a simple one of a security guard sleeping on duty;

6.2 the rule in the workplace was that this was a dismissible offence;

6.3 the rationale was obvious, namely the need to protect, personnel equipment, assets the mine and prevent illegal miners accessing it, and

6.4 the security guards operated in a risky environment, and it was important for them to be alert all the time.

[7] He summarised the critical evidence of the witnesses to what transpired thus:

> *"71. The version of the respondent was that Du Plessis started visiting various security points under his supervision. When he arrived, he went to the guard house at the Bank.The lights were off and decided not to use the door, but went to the window. He found the applicant sitting on a chair and her head tilted back in a sleeping position. He used a torch to flash on the applicant's face and he saw she was indeed asleep. He raised the torch higher, took a picture applicant using his cell phone.*
>
> *72. It was the version of the applicant that she was placed at the Bank on night shift on 9 February 2022. The area was busy at the early part on the shift and ended being much quieter. The last thing she did was to assist with an equipment at the turnstile at about 00:15 and then which check the gates before coming into the guard house. She switched off the lights, put the chair against the door and sat on it. The purpose of*

sitting against the door was to ensure that the door is not blown since it did not lock and it kept being blown by wind from underground. She sat on the chair and later heard Du Plessis going through the turnstile since it makes a loud noise when one clocks in and when it is turned. She was surprised when she saw him go to the window instead of coming through the door. Du Plessis never took her picture but now she remembers him complaining that she was sleeping.

73. The applicant denied that she was sleeping and that Du Plessis ever took her photo. The person on R 3 was not her. The applicant had testified that she assisted a colleague through a turnstile at about 00:15 and immediately thereafter went to check the gate first before going to the guardhouse. Du Plessis in his own evidence, arrived at the Bank at about 00:30. This means in less than 15 minutes the applicant checked the gate, went to the guard house, sat down on the chair and fell asleep to an extent that Du Plessis flashed a torch on her face and could not wake up. Du Plessis had to make a coughing sound for the applicant to wake up.

74. The second issue I have is that the applicant testified emotionally about the risk she was exposed to at the Bank and being alone. She testified that it was unsafe for her and therefore could not have slept, that was why she kept the light switched off so that she was able to see outside other than be seen. She testified that she could not have slept since she felt unsafe with a door that did not close properly or lock.

75. The third issue I have is that Du Plessis sought to corroborate his version with a photo on page R3. The applicant denied it was her on the picture. The picture according to it is not clear enough to show that this was the applicant or not. Du Plessis appeared to have taken only one picture, no sequence of pictures was taken to show the applicant waking up or standing up etc. The current photo does not assist at all. This make it difficult for any third party looking at the picture to be able to identify if the person on the photo was the applicant or not.

76. It is <u>therefore</u> my finding, <u>on the balance of probability, the respondent had failed to prove that the applicant was guilty of the</u>

sleeping on duty charge that was levelled against her. The party which had been burdened with the onus of proof has failed to discharge it.

77. I therefore do not find the applicant guilty of the allegation of misconduct."

(spelling corrected – emphasis added)

The review

[8] SGPS's grounds of review essentially concern whether the arbitrator's decision that it had failed to prove Njani guilty of sleeping on duty was one that no reasonable arbitrator could reach on the evidence before him. The main complaint is that the arbitrator did not in fact analyse the evidence at all but simply repeated portions of evidence and then pronounced his finding. In particular, he failed to weigh up the credibility, reliability and probabilities of the two conflicting versions presented by Du Plessis and Njani.

[9] SGPS also alleges, in evaluating the evidence, the arbitrator improperly considered issues which were not part of Njani's defence to the charge and had not been put to its witnesses under cross-examination. To a great extent this criticism will be dealt with in the course of dealing with the main ground.

Evaluation

[10] Reading the evidence mentioned by the arbitrator in support of his finding, which appears in paragraphs 71 to 75 of the award, it is apparent that the arbitrator singles out a handful of pieces of evidence as the basis for reaching a decision on the probabilities. While some of the factual narrative is common cause, the respective versions of the parties differ on the fundamental question of whether Njani was asleep when Du Plessis visited the guardroom. On this issue, the versions are mutually exclusive.

[11] The leading case on the evaluation of evidence in instances of irreconcilable versions is *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA), in which the court held at para 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 extracurial 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 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 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.'

[12] While it is trite that an arbitrator need not provide detailed reasons for an award, in this case the arbitrator's evaluation of the evidence was unnecessarily cursory and terse. The skimpy elucidation of an arbitrator's reasoning is not

acceptable and has been deprecated by this court before[1]. Although he provided a rough summary of each party's version, and scant analysis, one can discern that he treated two issues as decisive. Firstly, that Njani could not have fallen asleep in less than fifteen minutes and secondly, Du Plessis could not prove that the figure in the photograph was Njani. From this it follows that the arbitrator found it unnecessary to consider Du Plessis's own eyewitness testimony, in the absence of independent corroborating evidence his version. He also favoured Njani's version based on the plausibility of her evidence that she could not have fallen asleep so quickly. As a result, he made no attempt to weight up Du Plessis's oral testimony against Njani's account at all. Clearly, it is a material flaw in the arbitrator's logic to discount all of Du Plessis's testimony because he found it was not corroborated by a clear photograph, whereas he accepted Njani's evidence without corroboration.

[13] Even so, that is not the end of the enquiry. As the LAC mentioned in *Head of Department of Education v Mofokeng & others* [2] :
The court must nonetheless still consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence."

[14] Apart from the evidence of the contentious photograph, the arbitrator had the following pertinent evidence of the events before him.

[15] Njani claimed she had let a forklift truck out of the gate around 00:15. She was told by the artisan on duty that there was no more work for her to do and she could go and relax.

[16] She went to the guardroom and sat in chair, the back of which she placed against the door, because the door did not lock and wind from the shaft made the door bang. It was common cause that she had switched the

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[1] See e.g., *Sasol Mining (Pty) Ltd v Ngqeleni NO & others* (2011) 32 *ILJ* 723 (LC) at paragraph 7.

[2] (2015) 36 ILJ 2802 (LAC) at paragraph 31, and re-affirmed and emphasised in *Makuleni v Standard Bank of South Africa Ltd and Others* (2023) 44 *ILJ* 1005 (LAC) at paragraph 3.

guardroom lights off. Although she did not explain why she did this in her testimony at the arbitration, in the written statement she submitted to the company before the disciplinary enquiry, she said she did so because it was easier to observe the area outside if the lights were off. Njani testified that she then sat down and that was the right time to relax for her spiritual calling and consume her snuff.

[17] When she pleaded guilty at the disciplinary enquiry she mentioned that she had a medical condition which Du Plessis was aware of. It appears from the evidence, that she agreed to alter the reference to a 'medical condition' to a 'spiritual calling' after the chairperson queried the reference to a medical condition. When she was questioned in the enquiry about whether she could still be alert while engaging in her spiritual calling she responded that she was even more focussed when her ancestors were communicating with her. At the arbitration hearing, when questioned about the alteration in her plea, she said she did not want to reveal her medical condition which related to what she was suffering as a result of a traumatic sexual assault on her child. Accordingly, she decided simply to "*opt for the condition that is known"*, namely her spiritual calling.

[18] Du Plessis testified that he was driving around visiting the various guard posts that night. When he came to the Bank shaft, he noticed that the lights in the guard-house were off, so he clocked in through the turnstiles and walked around the guard house to the open window. He saw Njani sitting in the chair up against the door. She was covered with her jacket and her head was resting in the corner of the door and the wall. He claims he shone his torch in her face, but she did not move. He then pointed his flashlight at the ceiling and took a photo of her with his cell phone. He made a coughing sound which woke her up. He asked what she was doing, and she said she was sorry for sleeping, whereupon he said he would charge her for sleeping on duty. He made an entry about the incident in the Bank area occurrence book. Under cross-examination, Du Plessis said he would not have taken the photo if Njani's eyes were not closed. He was unaware of any condition that Njani was suffering from. This occurred around 00:31.

[19] In her written statement for the disciplinary enquiry, Njani said she saw Du Plessis clocking in at the turnstile and she saw him coming straight to the window holding his cell phone in his hand. He was not holding anything else. Immediately she saw him standing at the open window she went out to him. She denied he took any photo of her. She claimed she told him everything was in order and then he accused her of sleeping which she denied.

[20] On this evidence what is common cause is that Njani had been seated in a chair propped up against the entrance door in the unlit guardhouse. Where the versions diverge radically is whether she had fallen asleep in that position when Du Plessis arrived at the guardhouse and appeared at the window.

[21] The arbitrator decided to disregard the relevance of the blurred photograph because he was satisfied it could not be established that the person in the photo was Njani. Having decided this, he did not consider any other implications of the photograph.

[22] During the arbitration a clearer coloured photograph of the black and white version was produced. The image was still blurred. What it does show is the upper torso and head of a seated person who is wearing a mask over the lower part of their face. The person's head is lying at an angle of about 45 to 60 degrees measured from a horizontal position, and is lying partly on a brick surface and partly on two other surfaces. The person's eyes are not visible. A large black object covers the person's upper body and partially obscures part of the person's lower face. Du Plessis had testified that Njani had covered herself with her jacket. The overall impression is of a figure in a position of comfortable repose resting their head against some brickwork and other surfaces.

[23] The arbitrator did not consider any other implications of his conclusion that the person in the photograph probably was not Njani. One unavoidable implication of his finding was that Du Plessis did not take any photograph of Njani and therefor fraudulently presented a photograph of someone else to support his eyewitness account. In this regard, it is significant that when Du

Plessis was cross-examined about the photograph, the identity of the figure in the picture was not even raised as an issue. It was never put to him that it was not a photograph of Njani. Rather, the questions posed to Du Plessis concerned whether the picture showed the person's eyes were closed. Du Plessis's answer to the difficulty of seeing if the person's eyes were open or not was that, if they had been open, they would have been illuminated by the reflection of the flash of the cell phone camera and the torch.

[24] Another implication of the arbitrator's finding is that Du Plessis must have contrived to produce a photograph which carefully replicated the position of the chair on which Njani said she was seated. The black and white photographs of the chair against the door show that the position of chair in relation to the door frame and door correspond closely with the alignment of those surfaces and the figure in the chair. Quite apart from the fact that the arbitrator determined the relevance of the photograph solely on the basis of the identity of the figure in the photograph even though Du Plessis was never questioned about this, the arbitrator's finding necessarily entails Du Plessis having embarked on a meticulous photographic staging of the event, including the use of a third party to pose in the picture. It was never suggested that Du Plessis bore any grudge against Njani, which might have supported a version that he was prepared to take such elaborate steps to engineer her dismissal. The inherent improbabilities of this scenario were not considered by the arbitrator.

[25] If we focus on the attack on Du Plessis's evidence under cross-examination, what factors did the arbitrator have to weigh up to make a finding whether Njani's eyes were closed? Njani herself said she was intending to 'relax' when she sat down. She had claimed that Du Plessis was aware that she had a condition which was ascribed to her spiritual calling, as if to suggest she was suffering from impairment which might excuse her actions. He denied ever being advised of the same. It is important to note that it must be mentioned that much of her defence was based on the fact that other persons who had been found guilty of sleeping on duty, were not dismissed, and in those cases the employees were either on some medication or had worked excessive hours, which had impaired their ability to remain awake. Njani denied Du Plessis took a

photograph of her but did say he had a cell phone in his hand when she first saw him. Du Plessis said he would not have taken a photograph in the first place if Njani had been awake. The photo, though blurry, does not show even a glimmer of light on the reclining figure's face that might hint at an eye reflection of a camera flash or light, which tends to support his version. If Njani was asleep, she would have been unaware of Du Plessis taking a photo. Once it is accepted as more plausible that a photo was taken, showing her in the recumbent position, Njani's version that she was awake is hard to reconcile with her saying nothing to DP at the time the photo was taken.

[26] What emerges from the above, is that there are serious difficulties Njani had in putting up a plausible version that she was awake when Du Plessis found her at the guardhouse. Her own evidence that she was sitting in the chair and relaxing is consistent with the image captured in the photograph. Her version that it was not her in the photograph is inherently implausible for the reasons discussed and Du Plessis was not seriously challenged on that issue. Her bald denial that a photograph was taken of her is irreconcilable with the evidence which strongly supports the opposite conclusion, namely that it was taken of her at a time when she was asleep and she would not have been aware of it. No plausible alternative explanation was offered why her eyes would not have been visible, when she was photographed in the glare of a flash photograph and a torch. It also makes no sense that Du Plessis would have gone to the trouble of taking the photograph if Njani was sitting in the chair looking at him.

[27] Had the arbitrator weighed up the inherent probabilities of each version and then evaluated them against each other, I am satisfied he would not have reached the conclusion that Njani was not guilty of sleeping on duty and no reasonable arbitrator could have done so on the evidence.

[28] It was not seriously disputed that sleeping on duty was taken extremely seriously in the circumstances prevailing in the mine, which was grappling with the problem of illegal miners gaining access to the mine and obtaining supplies through shaft entrances, such as the one that Njani was situated on the night of

the incident. In the circumstances, it cannot be said that the employer's decision to dismiss Njani was an unfair one.

[29] In light of the above, the following order is made.

Order

1. The award of the Second Respondent under case number GAJB 18969-22 issued on 7 March 2023 is reviewed and set aside.
2. The finding and relief awarded in paragraphs 85 to 87 of the award, is set aside and replaced with a finding that the dismissal of Ms N Njani was substantively fair.
3. No order is made as to costs.

R Lagrange
Judge of the Labour Court of South Africa.

Appearances

For the Applicant	Adv. P Moll instructed by Solomon Holmes Attorneys Inc.
For the First Respondent	MC Malematja from Mashabela Attorneys