



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR129/21

In the matter between:

**HARMONY GOLD MINING COMPANY
LIMITED**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER SILAS SEGOLE N.O.

Second Respondent

NUM OBO FANE FANE AND 1 OTHER

Third Respondent

Heard: 11 June 2024

Delivered: 21 February 2025

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act¹. The applicant, Harmony Gold Mining Company Limited, a company duly registered in accordance with the company laws of the Republic of South Africa. The arbitration proceedings were held under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The second respondent is, Commissioner Silas Segole. The third respondent is the National Union of Mineworkers (NUM) on behalf of Fane Fane and Coohlo James Letuma (employees).

[2] The commissioner issued the arbitration award on 10 December 2020 and made a finding that the dismissal of the employees was substantively unfair and ordered the applicant to reinstate the employees with payment of back pay. The applicant received the arbitration award on 11 December 2020 and launched the review application on 22 January 2021.

The relevant facts

[3] Fane Fane was employed by the applicant as a scrapper winch operator on 29 July 2014 and Coohlo James Letuma was employed as a pump attendant on 29 September 1994. As part of the induction training, the applicant's employees are trained in security awareness. The security awareness includes all aspects relating to security for example theft, assault etc. Security awareness was not limited to health and safety issues.

[4] The applicant has installed various security measures to, amongst others combat illegal mining. One of these measures is the installation of video surveillance cameras underground. The video surveillance system was upgraded in 2012/2013 and is clearly visible and known to employees as part of the security system of the applicant. Approximately 6 to 8 video surveillance cameras were installed in the

¹ Act 66 of 1995, as amended.

crush tunnel underground. The CCTV cameras have been installed at Target operations for more than 10 years at the time of the incidents involving the employees.

[5] The purpose of the surveillance cameras in the crush tunnel was to assist with the challenges relating to illegal mining, the shrinking of material due to theft and to monitor people loitering in the crush tunnel to steal hours.

[6] On 7 April 2019 at approximately 19h30 and whilst in the crush tunnel, Fane Fane, who was wearing a balaclava at that time, is observed walking towards camera 5. He passed camera 5 and then turned back to camera 5 and reached up and shifted camera 5 from its original position to face the ground. From camera 2 it was clear that Fana reached up to camera 5.

[7] On 7 May 2019 at approximately 18h47 whilst in the crush tunnel, Letuma is observed by camera 2 walking towards camera 5. When Letuma reached camera 5, he reached up, shifted the camera from its original position towards the roof, pushed it a second time towards the roof and walked away.

[8] The applicant's security provider, Bidvest Protea conducted an investigation in respect of the employees' conduct. The employees were then charged. Fane Fane was charged with:

'Tampering with mine security camera on the 07th April 2019 at about 19h30 that are meant to monitor activities.

In that on the 07th April 2019 at about 19h30 you tampered with the mine security camera inside the crush tunnel at Target 1 shaft that is installed to monitor illegal activities as seen on the CCTV video camera footage.'

[9] Letuma was charged with:

'Tampering with mine security camera on the 07th May 2019 at about 18h47 that are meant to monitor activities.

In that on 7th May 2019 at about 18h47 you tampered with mine security camera inside the crush tunnel at Target 1 shaft that is installed to monitor illegal activities as seen on the CCTV video camera footage.'

[10] The employees were subjected to a disciplinary hearing and subsequently dismissed on 17 September 2019. The employees unsuccessfully appealed their dismissals. The employees assisted by their trade union NUM, referred an unfair dismissal dispute to the CCMA. The dispute was eventually resolved by means of arbitration and the commissioner issued the arbitration award.

Grounds of review

[11] The pleaded grounds of the review of the applicant are that: the commissioner committed gross irregularity in that he considered irrelevant considerations and/or failed to consider relevant and material evidence before him in so far as knowledge and contravention of the rule is concerned. The applicant stated that illegal mining is plaguing the South African mining industry. The applicant implemented various security measures to combat illegal mining and the employees were aware of the security measures implemented. The commissioner failed to consider that the video surveillance cameras had been installed for an extended period of time and that both employees would have walked past it (and other cameras) on numerous occasions prior to the incidents.

[12] The commissioner committed a gross irregularity in the conduct of the proceedings in that he misconceived the nature of the inquiry. This is related to the fact that the commissioner's failure to apply his mind to issues which were material to the determination of the dispute leads him to misconceive the nature of the enquiry. The commissioner's finding that since no illegal mining occurred (or was reported on 7 April 2019 and 7 May 2019, the employee did not contravene the rule, this finding ignores the fact that the employees were not charged with participation in illegal mining. The commissioner was therefore not required to consider whether the employees' conduct resulted in illegal activities.

[13] The commissioner committed a gross irregularity in the conduct of the proceedings in that he committed an error of law. One of the essential pieces of information which the employee who alleges inconsistency has to put forward concerns the details of the employee who s/he alleges has received preferential

treatment in relation to the discipline that the employer may have meted out. The onus therefore rested on the employees to provide comparator employees in order for the applicant to be in a position to prove that it had applied discipline consistently. The commissioner committed an error of law in that he attributed the onus of proof to the incorrect party.

[14] The commissioner committed a gross irregularity in that he made an unreasonable credibility finding against Mr Petzer in circumstances where credibility findings were unnecessary. The credibility finding against Mr Petzer was based on the commissioner's perception of the absence of the rule that the employees contravened.

Submissions by the parties

[15] Mr Kruger on behalf of the applicant submitted that the commissioner misconstrued the nature of the enquiry, when he concluded that the applicant failed to prove that the employees contravened the rule by tampering with the surveillance camera in pursuance of the illegal mining activities. The employees were never charged with participation in illegal mining activities. The fact that there was no damage suffered by the applicant, was not what the case of the applicant was all about.

[16] What the applicant's case was about is that the employees by tampering with the surveillance cameras, defeated the purpose for which the cameras were installed. Consequently, the commissioner deviated from the correct path. By moving the cameras, the employees affected the business of the applicant.

[17] The commissioner considered irrelevant considerations and *ignored* the relevant considerations. The evidence of Mr Petzer was that when entering the crush tunnel, there was a sign that said the area was under CCTV cameras. There was no requirement that the employees needed to be told where the cameras were situated. The commissioner failed to consider that the cameras were installed for a period of 10 years prior to the incidents that led to the dismissal of the employees.

[18] The employees deliberately and intentionally moved the cameras. Security and safety are big issues in the mining industry. The employees were aware that they should not tamper with the cameras. The commissioner should not have made credibility findings against Mr Petzer. The balance of probabilities was enough.

[19] During the arbitration proceedings, the employees did not raise the issue of inconsistent application of discipline by the applicant and the commissioner committed an error of law when he placed the onus of proof on the applicant in respect of the inconsistent application of discipline.

[20] Mr Malematja on behalf of the employees submitted that the commissioner correctly referred to the code of good practice. The employees had no nefarious intentions when they touched the cameras. The applicant failed to prove that the employees were showing illegal intent when they touched the cameras.

[21] The applicant has no rule against touching the cameras. The commissioner accordingly reached a reasonable conclusion. Mr Petzer contradicted himself in respect of whether the employees were trained about the cameras. The employees during the arbitration proceedings did not raise the issue of inconsistent application of discipline by the applicant.

[22] It was the evidence of the applicant that it had previously dismissed other employees for similar misconduct. It was therefore not the employees' case at arbitration that the applicant applied discipline inconsistently. There was no rule contravened by the employees and the commissioner's finding in this respect was reasonable. It was submitted that there was no evidence led by the applicant which showed that tampering with the applicant's property was an offence.

[23] The employees conceded that they touched the cameras. There was no dishonesty and the trust relationship between the employees and the applicant was not broken. After the employees touched the cameras, the day-to-day operations of the applicant were not interrupted.

The arbitration award

[24] In the arbitration award, under the heading “*analysis of evidence and argument*”, the commissioner made the following findings: (Verbatim):

‘[19] In respect of the abovementioned evidence, I find that the respondent did not have a written policy covering the use of the surveillance camera in the workplace. I further find that there was no proof that the applicant where aware of the rule. The witness of the respondent failed to prove that the applicant where also made aware that they will be recorded and where the surveillance cameras where being located. No proof in a form of attendance register that the employees were made aware of the existence of the surveillance cameras at the underground. Therefore, without such proof, I will not be convinced that such a written policy ever existed or the applicants were aware of the surveillance cameras.

[20] I find that even though such rule could have been valid and reasonable, the respondent had failed to prove that the applicants contravened the rule by tampering with the surveillance camera in pursuance with the illegal mining activities. There was therefore no proof of the illegal mining activities were reported as a result of their conduct. There was also no extent of damage which the respondent incurred to prove that the conduct of the applicant affected the business. Therefore, the respondent could not just rely on suspicion which could not be proven. In that regards I find the evidence of the applicants to have weigh more than the respondent.

[21] I find that the respondent failed to prove which of the employees were dismissed for similar misconduct. Therefore, I find that in the absence of such proof, I rendered the dismissal of the applicant to be substantively unfair. After consideration of the above, it is my view that the respondent must rely on a written policy which covers the use of the surveillance cameras at the workplace when it intends to apply discipline. The employees must also be informed of the existence of surveillance cameras at the underground and where are they strategically located before action could be taken against them.’

Evaluation

[25] The test for review is settled. In *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd v Legobate*², the Labour Appeal Court (LAC) held that:

'[12] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision maker could not reach?" Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review. However, a survey of the judgment of the Labour Court reveals that it reviewed and set aside the commissioner's award without finding that the result of the award was unreasonable.'

[26] It is common cause between the parties that it was not the employees' case at arbitration that their dismissal was substantively unfair as the applicant applied discipline inconsistently. The employees' case was that they did not contravene any rule at the workplace.

[27] The finding by the commissioner that the applicant failed to prove which of the employees were dismissed for similar misconduct, was not an issue which required a determination by the commissioner. However, it appears that this finding by the

² (2015) 36 ILJ 968 (LAC); [2015] 2 BLLR 105 (LAC) at paras 12- 13.

commissioner was considered by him to come to a conclusion that the dismissal of the employees was substantively unfair.

[28] In our law, the onus is on the employee to prove inconsistent application of discipline by way of evidence in establishing the details of employee that he/she has received preferential treatment in relation to the discipline that the employer meted out as compared to the employee making allegations regarding inconstancy. The commissioner, placed the onus on the applicant to prove which employees it dismissed for similar misconduct. This was an error of law on the part of the commissioner. The commissioner further, misconstrued the nature of the inquiry. He simply did not understand the issue that he needed to determine when he made above finding.

[29] The commissioner's finding that there was no rule contravened by the employees was disconnected to the evidence which was before him and rendered the outcome unreasonable. The evidence of Mr Petzer in arbitration in respect of the rationale for having security cameras was that³:

'The reason for this camera to be installed at that turn was that we have employees that come from underground earlier than what they are supposed to. They crush out and they sit in the crush. Then they do not crush up until the certain time that they are allowed to crush.

The cameras were installed in the crush tunnel to protect the client's property and also to the safety of the employees and it is also to detect any illegal activities.⁴

[30] Under cross-examination, the following exchange occurred between the employees' representative and Mr Petzer⁵:

'Applicant Rep: Yes. Sir, do you know of any rule or policy of the mine relating to tampering of cameras.

Mr Petzer: Yes, Harmony's code of conduct.

Mr Petzer: It says there the purpose:

³ Index to record of proceedings page 21.

⁴ Index record to proceedings page 27.

⁵ Index record of proceedings page(s) 33- 34.

'Tamper with the cameras causing an interruption of surveillance. Therefore malicious damaging of the client's property which has been installed for a certain purpose and due to the employee's action the purpose cannot be fulfilled.'

[31] It is not clear why the commissioner ignored the above evidence of Mr Petzer. It was common cause that the employees touched the cameras. The evidence of Mr Petzer was that only specialized trainer technicians were allowed to touch the cameras. The employees are not allowed to touch the cameras. Mr Petzer's testimony was that the employees by moving the surveillance cameras, interrupted the day-to-day operations of Harmony.

[32] Under cross-examination, Mr Petzer testified that when entering the crush area, there was a sign that said the area was under surveillance by the cameras. The rule which the commissioner stated was not contravened, relates to what he termed written policy covering the use of surveillance cameras in the workplace and or there was no rule against touching the cameras. It is trite that not every workplace rule must be written down by the employer.

[33] The surveillance cameras were installed at the crush tunnel for approximately ten (10) years prior to the incident involving the employees. The employees ought to have known, that they are not supposed to touch the installed surveillance cameras. Any reasonable employee in the position of the employees would have known that they were not supposed to touch the security cameras. The employees further knew that the crush tunnel was an area under surveillance cameras, as per the evidence of Mr Petzer. The purpose of installing the surveillance cameras in the crush tunnel would have been defeated if the employees of the applicant were allowed to touch the security cameras.

[34] The commissioner's finding that the applicant failed to prove that the employees were also made aware that they would be recorded and where the surveillance cameras were being located, this reasoning by the commissioner is unreasonable and shows that the commissioner failed to properly apply his mind to the material evidence before him. The employees knew where the cameras were

located. They touched the cameras and changed the view/and or direction of the cameras. It stands to follow, that any surveillance camera installed to curb illegal mining, to protect the property of the applicant, the shrinking of material due to theft and for the safety of employees, would be recording. There is no purpose in installing surveillance cameras that are not recording.

[35] The evidence of Mr Petzer that the applicant's code of conduct deals with tampering of cameras causing an interruption of surveillance and that this is malicious damage of the applicant's property which has been installed for a certain purpose and due to the employee's action, the purpose cannot be fulfilled, constituted a workplace rule. The employees knew about this rule or ought to have known about this rule given their long service of work and the fact that the cameras were installed for a long period of time. The commissioner committed gross irregularity which materially affected the outcome of the arbitration award when he ignored the above evidence of Mr Petzer.

[36] Consequently, the commissioner's finding that there was no rule which was contravened by the employees, constituted a gross irregularity which materially affected the outcome of the arbitration. The outcome was therefore not reasonable.

[37] The employees were not charged with participation in illegal mining activities. The employees were further not charged with causing damage to the business of the applicant. The commissioner's finding that there was no proof of illegal mining activities and no damage caused to the business of the applicant, illustrates that the commissioner misconceived the nature of the inquiry and therefore produced an unreasonable outcome.

[38] The finding in respect of no illegal mining activities or damages suffered by the applicant after the employees touched the cameras, was an irrelevant consideration on the part of the commissioner and further show the unreasonable reasoning by the commissioner.

[39] The applicant was not required to prove that the employees by touching and changing the view or direction of the cameras had nefarious intentions. This is not

what the charges faced by the employees implied. All that the charges stated were that the employees tampered with the security cameras.

[40] The credibility finding made by the commissioner was a half-baked process which fell short of the process which a commissioner must follow to resolve a factual dispute⁶ between the parties. The version of the applicant during the arbitration proceedings was reliable, credible and probable. Any contradictions in the applicant's case were minor and did not mean that the testimony of Mr Petzer was not truthful. The version of the employees was that they touched the cameras as they saw something that looked like a speaker. This version of the employees was far-fetched and downright improbable.

[41] If they thought that the camera was a speaker or the speaker was on top of the camera, why did they change the view/ and or direction of the cameras and interrupt their proper functioning. The balance of probabilities is that given the employees long service and the long period of time since the surveillance cameras were installed at the crush tunnel, the employees knew or ought to have known that they were touching the cameras and they intentionally and deliberately changed the view/and or direction of the cameras and thus interrupting their proper functioning. Based on the evidence before him, the commissioner ought to have rejected the version of the employees.

[42] The commissioner considered irrelevant things and ignored the relevant considerations. The commissioner failed to consider that each employee before they touched the camera, they looked around to check if there was someone behind them. That Fane Fane, had passed camera 5 and then turned back to touch it and changed the view/and or direction of camera 5 by facing it to the ground. As for Letuma, he touched camera 5 and changed its view and/or direction to face the roof. The conduct of the employees constituted tampering with the security cameras of the applicant. The conduct of the employees interrupted the proper functioning of the surveillance cameras.

⁶ A process of resolving a factual dispute between the parties was succinctly summarized in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); [2002] ZASCA 98.

[43] The unreasonable credibility finding by the commissioner and the absence of proper assessment of evidence resulted in the outcome which was unreasonable.

[44] Given, the totality of the evidence before the commissioner, the decision reached by the commissioner was a decision which a reasonable decision maker could not reach and the arbitration award must be reviewed and set aside.

[45] In the premises, I make the following order:

Order

1. The arbitration award issued by the second respondent under case number: FSWK3029-19 dated 10 December 2020 is hereby reviewed and set aside.
2. The arbitration is remitted back to the first respondent to be heard *de novo* before another commissioner other than the second respondent.
3. There is no order as to costs.

H. Molotsi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr A. Kruger
Instructed by: Webber Wentzel

For the Respondent: Mr M. Malematja
Instructed by: Mashabela Attorneys