

IN THE LABOUR COURT OF SOUTH AFRICA**HELD IN JOHANNESBURG****CASE NO: J2662/00****In the matter between :****ANGLOGOLD LTD****Applicant****And****MZUNGULU MTHOMBENI****First Respondent****NATIONAL UNION OF MINEWORKERS****Second Respondent****L P MOSIUOA****Third Respondent**

JUDGEMENT

GERING AJ

- [1] The Applicant has applied for an order to review and set aside an arbitration award handed down on 28 April 2000 by the First Respondent, Professor Mthombeni, in which he found that the dismissal of the Third Respondent ("**the employee**") by the Applicant was substantively unfair, and ordered the Applicant to reinstate the employee with retrospective effect.
- [2] The award was made pursuant to a private arbitration conducted under the auspices of IMSSA. The First Respondent was jointly appointed by the Applicant and the Second Respondent to arbitrate.

- [3] The arbitration was conducted in terms of the Arbitration Act 42 of 1965, section 28 of which provides that the award **"shall be final and not subject to appeal"**.
- [4] Although in the Applicant's written Heads of Argument it was submitted that the principles applicable to a review of a CCMA award under the Labour Relations Act of 1995 are equally applicable to a review of a private, consensual arbitration award under section 33 of the Arbitration Act, at the hearing Counsel for the Applicant conceded that the narrower test under the Arbitration Act applied and not the wider test as laid down in *Carephone (Pty) Ltd v Marcus NO and others* [1998] 19 ILJ 1425 (LAC), although he reserved his right to argue the contrary should the matter proceed further.
- [5] In my view, the above concession by Counsel was correctly made. For a recent judgment reviewing the cases, see the unreported judgment of Landman J in the *United Pharmaceutical Distributors* case, J 1884/99, dated 15 September 2000.
- [6] As stated by Goldstone JA in *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (AD), **"It is only in those cases which fall within the provisions of section 33(1) of the Arbitration Act 42 of 1965 that a Court is empowered to intervene."** He emphasized that **"the basis upon which a Court will set aside an arbitrator's award is a very narrow one."**
- [7] In terms of Section 33 of the Arbitration Act, an award may be reviewed on any one or more of the following grounds:
- (d) If there was misconduct on the part of the arbitrator in the conduct

of the arbitrator's duties;

(d) If gross irregularity was committed by the arbitrator in the conduct of the proceedings;

(d) if the arbitrator acted outside the arbitrator's powers; or

(d) if the award was improperly obtained.

[8] At the hearing I asked Counsel for the Applicant as to which ground the Applicant relied on, and his reply was "**misconduct**".

[9] The position in regard to misconduct is summarized as follows in LAWSA vol 1(first reissue) para 445:

"Misconduct by arbitrator: The word misconduct must be construed in its ordinary sense of wrongful or improper conduct of the part of the person whose behaviour is in question. A bona fide mistake of law or fact cannot be construed as misconduct ; but if the mistake is so gross or obvious the award may be set aside on the ground of misconduct, the mistake merely amounting to evidence of the misconduct."

[10] In the Veldspun case (supra) at 168-69, Goldstone JA stated:

"As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make as to fact or law. It is only where the mistake is so gross or manifest that it would be evidence

of misconduct or partiality that a Court might be moved to vacate an award: Dickenson & Brown v Fisher's Executors 1915 AD 166 at 174-81. It was held in Donner v Ehrlich 1928 WLD 159 at 161 that even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference."

[11] I turn now to the Arbitrator's award (Papers 91-98), in particular that portion headed **"Analysis of evidence and argument"** (pages 97-98). The charge on which the employee was found guilty and was dismissed, reads as follows:

"Possession of gold-bearing material (3 pieces of smelted gold) or alternatively theft / unauthorised possession and /or involvement of theft and/or possession of gold-bearing material valued at R9142."

[12] The award, which is not a model of lucidity, does not set out the charge. It states, correctly, that it was common cause that gold concentrate was found in the motor vehicle that the employee was driving at the time in question.

It states that what is in dispute is whether the gold concentrate was the Company's property, and whether the employee was in possession thereof.

What was also common cause, although not specifically mentioned in this part of the award, is that at the time there was a passenger, Mr. Dhliwayo, in the vehicle, and that three gold nuggets were found in the passenger's possession.

[13] There is unfortunately no Record of the arbitration proceedings (see Papers pages 135-36) but there is a handwritten statement by the passenger (Papers page 35) that the plastic bag found in the vehicle containing the gold concentrate, and its contents belonged to the passenger. At the criminal trial, the passenger pleaded guilty, and was sentenced to two years imprisonment. The charges against the employee were withdrawn. The award correctly states that the withdrawal by the State of the criminal charge against the employee has no bearing on the disciplinary hearing by the Company.

[14] It is clear that there was evidence, which the arbitrator was entitled to accept, that the passenger was in possession of the gold concentrate found in the vehicle. The employee denied knowledge of the plastic bags, and there is no finding that the employee was in possession of the gold concentrate. The onus is of course on the Company to prove, on a balance of probability, the elements of the charge on which the dismissal is based. The award does state:

"Based on the analysis of the evidence, I am not convinced that the gold concentrate found under console belonged to Mr. Dhliwayo alone."

The arbitrator then goes on to state: **"For this reason, I am satisfied that the [employee] was involved in dealing in gold on the day in question."** This however was not the charge which the employee was summoned to answer at the disciplinary enquiry. (See Founding Affidavit, para 9.2)

[15] The attack on the award is summarized in para 7 of Applicant's Head of Argument, as follows:

"The Arbitrator found that the employee's dismissal was substantively unfair because, he found, the Applicant had failed to prove on a balance of probabilities that the gold found in the employee's possession belonged to it. In so doing, it is respectfully submitted that the Arbitrator plainly erred in material respects. Firstly, it was quite unnecessary for the Applicant to prove that the gold in question was its property: for obvious reasons dealing in gold, no matter whose, constitutes a particularly serious offence for an employee of a goldmining company. Secondly, and in any event, the Arbitrator misapplied the test for establishing proof of an offence on the balance of probabilities, and ignored direct relevant evidence in finding that the onus had not been discharged."

[16] It is correct that the Arbitrator stated : **"I must consider the Union's contention that the Company did not verify whether the gold concentrate was its property."** At the hearing Counsel argued strongly that this was an error of law, in that ownership of the gold concentrate found in the vehicle was not an element of the offence. That may well be so, but on the way in which the charge was formulated by the Company, and the manner in which the proceedings appear to have been handled, both at the disciplinary enquiry chaired by Mr. Van Greunen, and also at the arbitration proceedings, this does not seem to be an unreasonable error.

[17] The wording of the relevant statutory provision reads: "No person shall have

in his possession any unwrought precious metal" [unless authorized] ; see Mining Rights Act 20 of 1967, section 143(3). This wording makes it clear that ownership by the Company is not a necessary element. When I enquired from Counsel why this wording had not been followed, no satisfactory explanation was given, save that it was not necessary to do so. While this is no doubt correct, this would have avoided doubt as to what the Company had to prove. In any event it seems to me that at most this was a bona fide and reasonable mistake of law, and not a basis to review the award.

[18] I would also point out in regard to this paragraph of Applicant's Heads, that it is not sufficient to prove **"an offence"**; the onus is on the Company to prove the actual charge which the employee was summoned to answer. **"Dealing in gold"** was not the charge put to the employee. Moreover it is incorrect and misleading to refer to **"the gold found in the employee's possession"**. It was gold concentrate, not gold, and it was not found in the employee's possession, but in the vehicle which he was driving, and it ignores the fact that there was a passenger in the vehicle, who admitted that the plastic bag and its contents were the passenger's. There was clear evidence that the gold concentrate was in the passenger's possession, but there was no such evidence that the employee was in possession, and there is no finding by the arbitrator in the award that the gold concentrate was in the employee's possession. Even though the Arbitrator stated in negative terms that he was not convinced that the gold concentrate found in the vehicle belonged to the passenger alone, this does not amount to a positive finding that the employee was in possession of the gold concentrate at the relevant time.

[19] As regards the question whether the Company had established that the gold concentrate was its property, there was no direct evidence to establish this. Mr Van Greunen who chaired the disciplinary enquiry, stated that **"due to financial implications it could not be established where it came from. One of the witnesses, Mr Austen, conceded that it was difficult to establish where the gold came from, but stated that this could be done by a method called "fingerprinting", but this was "costly and time-consuming".**

[20] In the absence of such direct evidence, the Applicant sought to rely on an affidavit deposed to by one N M Mabala, an assistant forensic analyst. According to this affidavit, the percentage gold content in the concentrate was 36.36. The purpose of the affidavit was to determine whether any unwrought precious metals were present in the contents of the plastic bag. The affidavit does not however state that this fact made it likely that the gold concentrate came from the Company's No 2 plant. The Founding Affidavit goes on to allege:

"According to Van Greunen that percentage was unusually high compared with percentage concentration of gold at other milling stages of the ore, but not high for gold found in the reliner mills of the No 2 Plant." (See Founding Affidavit para 13.2).

[21] In para 4.17 of the Answering Affidavit, it is denied that Van Greunen made any comparison between the percentage concentrations. In view of the absence of the Record of the Arbitration proceedings, referred to above, and the denial of the allegation relating to Van Greunen's evidence, the Applicant cannot rely on this evidence.

[22] Accordingly there was no direct evidence to prove that the gold concentrate was the Company's property, and it was therefore necessary for the arbitrator to examine and to assess the circumstantial evidence.

[23] This the arbitrator proceeded to do. He stated that the Company relied on the fact that the employee had access to gold concentrate because he was working at the reliner plant. At the arbitration, the employee had testified that it would have been impossible for him to remove gold concentrate from the plant because security officers are always present. Employees go through two gates at the plant where they are searched by the security officers. For this reason, he said it was impossible for him to steal gold from where he works. [Papers page 95] In his award the arbitrator stated that this was not challenged by the Company. The arbitrator, dealing with the question what inference should be drawn, stated: **"There is no evidence by the Company that, besides access to the relining plant, there had been incidents of breach of its security. While I am convinced that dealing in gold is rife in G Hostel, I am not satisfied that the gold concentrate in question came from the Company's plant. An inference that the gold amalgam could have come elsewhere is equally possible."** After referring to **AA Onderlinge Assuransie v De Beer 1982 (2) SA 600 (AD) at 614** to determine whether the circumstantial evidence established that the gold concentrate belonged to the Applicant, he held that the evidence was not sufficiently cogent for him to draw the inference asked for by the Applicant.

[24] In my view, having regard to the failure of the Company to lead direct evidence -- which it could have done -- that the gold concentrate was its property, as well as the failure of the analyst's affidavit to establish this, it

was not unreasonable for the arbitrator to come to the conclusion that the circumstantial evidence was not sufficiently cogent to discharge the onus which clearly rested on the Applicant. At the most it could be described as an erroneous finding, but applying the **"very narrow test"** referred to above, it cannot be said that the arbitrator's decision is grossly unreasonable or that he acted mala fide when he made his finding.

[25] For the reasons expressed above, no grounds have been established for this Court to interfere with the award of the First Respondent. In the result, the application is dismissed with costs.

LEONARD GERING
ACTING JUDGE
LABOUR COURT

APPEARANCES:

: Mr A. Van Niekerk
: Perrott, Van Niekerk and Woodhouse INC

: Ms M Phooko
: Cheadle Thompson And Haysom INC

: 15 December 2000

: 31 January 2001