THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2099/16

In the matter between:

ANGLOGOLD ASHANTI LIMITED **Applicant**

And

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION OBO M DLUNGANE **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

COLLINS LENKWASI MAKAMA *N.O* **Third Respondent**

Heard: **06 February 2020**

Delivered: **20 February 2020**

Summary: **Review application – *prima facie* circumstantial evidence shifts the evidentiary burden – the employee must give cogent explanation in rebuttal – when charged with theft, the employee may be convicted of a competent verdict of unauthorised possession.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an application brought in terms of section 145 of the Labour Relations Act[1] (LRA) by the applicant, AngloGold Ashanti Limited (AngloGold), to review and set aside the arbitration award issued on 12 September 2016 by the third respondent, Mr Collins Lenkwasi Makama (commissioner), under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), under case number NWKD2034-16. The commissioner found that the dismissal of Mr Matopane Dlungane (Mr Dlungane), a member of the first respondent, Association of Mineworkers and Construction Union (AMCU), was substantively unfair. He reinstated Mr Dlungane retrospectively with back pay amount of R48 509.76.

[2] AngloGold's main impugned is that the commissioner misconstrued the nature of the enquiry and, consequently, there was no fair trial of issues. The application is opposed only by AMCU.

Background facts:

[3] AngloGold is a mining company with a national footprint. Mr Dlungane was in its employ as a Loco Operator. He was dismissed for misconduct on 26 April 2016 subsequent to the verdict of guilty on, firstly, a charge of theft of gold bearing material and, secondly, a charge of illegal possession of gold bearing material.

[4] It is common cause that Mr Dlungane gave permission to the personnel from AngloGold's Security Department, *inter alia*, to conduct a search for traditional weapons in his hostel room. Mr Johannes Pottas (Mr Pottas), an AngloGold's security officer, testified that he was part of the personnel that conducted the search in the presence of Mr Dlungane. Mr Dlungane unlocked the door of his hostel room in order to allow them entry.

[1] Act 66 of 1995, as Amended.

[5] During the search, they found rocks suspected to be from the underground reef which were gold bearing, sjamboks and knobkerries. The rocks were put in a bag and sealed in the presence of Mr Dlungane. The subsequent test confirmed that the rocks had gold valued at 58 cents. This evidence was corroborated by Mr Jacques Liebenberg (Mr Liebenberg), a Senior Technical Officer, who was present during the search.

[6] AngloGold laid a criminal charge against Mr Dlungane with the South African Police Service (SAPS) for illegal possession of gold bearing material.

[7] Mr Dlungane denied any knowledge of the gold bearing material. He was adamant that he only became aware of the allegation that some gold bearing material had been found in his hostel room during his Magistrate Court appearance in relation to a charge of sjambok and knobkerries. However, this version was challenged as it is irreconcilable with his version during the disciplinary enquiry that someone placed the gold bearing material in his hostel room in order to frame him.

Arbitration award

[8] The commissioner conclusively ruled that the gold bearing material was found inside Mr Dlungane's hostel room. He was also satisfied that it belonged to AngloGold since the kind of material could only be found in the mining vicinity or the underground reef and contained gold, though of negligible value.

[9] On the first charge of theft, the commissioner found that AngloGold failed to prove that Mr Dlungane was guilty of theft simply because it failed to lead evidence to show where, when, how and by whom was the gold bearing material stolen. He opined that AngloGold would have succeeded if it had charged Mr Dlungane with unauthorised possession of gold bearing material as opposed to theft.

[10] On the second charge, the commissioner criticised AngloGold for charging Mr Dlungane with illegal possession of gold bearing material because it

presupposed that he had committed some illegal activity when the instrument breached was not specifically mentioned in the charge sheet. He concluded his analysis with the following tangle:

> '…Similarly with the first charge, the respondent has failed to show any illegality on the part of the applicant. As I said before, the respondent was able to show via evidence that the stones worth 58 cents we found in the room of the applicant, but would not show any illegal aspect of the charge. Also, strictly speaking, the applicant was not in possession of those GBM, but those items were found inside his room. Can we then say that by virtue that they were found in his room to mean that he was in possession of those items? It is open to a number of interpretation and some doubtful ones.'[2]

[11] AngloGold submitted that the commissioner committed serious errors of law and fact. He was oblivious to the law on circumstantial evidence and evidentiary burdens and as a result he applied an incorrect burden of proof. Also, he adapted an inflexible approach in interpreting the ambit of disciplinary charges.

Review test and application

[12] It is trite that mere errors of fact or law may not be enough to vitiate an award. Notwithstanding, if errors material to the determination of the dispute constitute a misconception of the nature of the enquiry which consequently affect the fair trial of the issues, an award may be set aside on that ground alone. The authoritative pronouncement in this regard remains the Labour Appeal Court's (LAC) decision in *Head of the Department of Education v Mofokeng,*[3] where it was stated that:

> '[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd*

[2] See: Arbitration Award, page 6 at para 26.
[3] [2015] 1 BLLR 50 (LAC) at paras 30-33; see also *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).

(Kloof Gold Mine) v CCMA and others have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…

[32] …Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, if an irregularity or error material to

> the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.' (Emphasis added)

[13] Turning to the matter at hand, the commissioner clearly failed to address the question raised for determination. Fairness is the hallmark of the law of dismissal.[4] In *National Battery (Pty) Ltd v Matshoba and Others*,[5] the court pointed out that the labels assigned to the misconduct are irrelevant – the point is whether the evidence demonstrates a case of wrongdoing. This thesis was recently buttressed by the LAC in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[6] pertinently stating that:

> '[15] One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge, or add new charges, after the commencement of the hearing where it would be prejudicial to do so. However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance.
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> [16] Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the

[4] See: *Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others* [2015] 9 BLLR 887 (LAC); (2015) 36 ILJ 2273 (LAC) at para 18.
[5] (2010) 5 BLLR 534 (LC).
[6] (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC) at paras 14 -16.

> evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards. (Emphasis added)

[14] In this instance, it is clear that the Commissioner failed to comprehend that AngloGold had established a *prima facie* case of theft through circumstantial evidence. Mr Dlungane was the Loco Operator at the mine, the gold bearing material belonging to AngloGold was found in his hostel room. The evidentiary burden shifted to Mr Dlungane to provide a credible explanation as to how the gold bearing material ended up in his hostel room but to no avail. The commissioner immersed himself with unhelpful questions and ultimately misconstrued what constitutes theft.

[15] Also, even if AngloGold failed to prove a charge of theft, unauthorised possession is a competent verdict in the circumstances. Despite having opined so initially, the commissioner's parting short seems to cast doubt as to whether Mr Ndlungane was indeed in possession of the gold bearing material found in his room. Clearly, the commissioner confused possession as only referring to having an object in your hand or physically. The test is, however, whether a person has control intentionally exercised toward a thing. In this instance, the gold bearing material was found in Mr Dlungane's hostel room which meant that he had exclusive and intentional control over same.

[16] On the second charge, the commissioner's findings are not supported by evidence. Mr Pottas testified that it is illegal to be in possession of gold

bearing material in terms of the Precious Metals Act.[7] He was also adamant that Mr Dlungane was aware that it is illegal to be found in possession of the gold bearing material. This evidence was not disputed. Clearly, as stated in *EOH Abantu*[8] dictum, failure to refer to the said prescript in the charge sheet was not fatal to the case of AngloGold given the fact that Mr Dlungane was aware or ought to have been aware that being in possession of gold bearing material is prohibited.

[17] I also note that in terms of AngloGold Disciplinary Code, theft and unauthorised possession of gold bearing material are dismissible offences. Even though it is not a given in every instance, in the circumstances of this case, Mr Dlungane's actions rendered the employment relationship intolerable so as to justify a sanction of dismissal.

Conclusion

[18] In all the circumstances, I am satisfied that the commissioner misconceived the nature of the enquiry and consequently there was no fair trial of the issues. Put otherwise, he diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination. Based on this ground alone, the award stands to be reviewed and set aside.

[19] I deem it expedient not to remit this matter back to the CCMA in the interest of justice. The issues were properly ventilated during the arbitration proceedings and the adequacy of the record of those proceedings is not placed in issue. I am, accordingly, in a position to determine the matter to its finality.

[20] In the light of the findings I have arrived at above, it is clear that the dismissal of Mr Dlungane was substantively fair.

Costs

[7] Act 37 of 2005.
[8] *Supra* n 5.

[21] Tritely, costs do not follow the result in this Court; but the requirements of the law and fairness are a main consideration. It therefore accords the requirements of law and fairness that each party should bear its own costs.

[22] In the circumstances, I make the following order.

Order

1. The arbitration award dated 12 September 2016 under case number NWKD3034-16 is reviewed and set aside and substituted with the following order:

   1.1 The dismissal of Mr Dlungane is substantively fair.

2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Mr L Frahm-Arp from Fasken, incorporated in South Africa as Bell Dewar Inc.
For the Respondent:	Advocate C Malan
Instructed by:	Larry Dave Incorporated