THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

Case no: JR 2684/13

SIBANYE GOLD LTD (DRIEFONTEIN MINE)	**Applicant**
And	
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	**First Respondent**
COMMISSIONER FAIZL MOOI N.O.	**Second Respondent**
AMCU obo TSHEDISO LETJABA	**Third Respondent**

Heard on: **2 February 2017**

Order: **7 February 2017**

Reasons: **14 February 2017**

Edited: 1 March 2017

REASONS FOR JUDGMENT

VAN NIEKERK J

[1] On 7 February 2017, I granted an order reviewing and setting aside an arbitration award issued by the second respondent, to whom I shall refer as

'the arbitrator'. In his award, issued on 1 November 2013, the arbitrator found that the third respondent's dismissal was substantively unfair. He ordered the applicant to reinstate the third respondent. I substituted that order with an order that the third respondent's dismissal was substantively and procedurally fair.

[2] The material facts are not in dispute and appear from the arbitrator's award as well as the transcribed record of the proceedings under review. I do not intend to burden this judgment are worth a repetition of the evidence; it is sufficient to state for present purposes that the third respondent was dismissed on 23 November 2012 after having been found guilty of a refusal to obey reasonable instruction. The instruction concerned was issued by the third respondent's supervisor and required him to take a galley box switch and exchange the faulty switch.

[3] The arbitrator's substantive findings are recorded in paragraphs 37 to 46 of his award. In essence, the arbitrator noted that the first charge against the third respondent was that relating to the provision of false information in that he reported the supervisor that the faulty winch had been fixed where as it had not been fixed. The arbitrator noted there the third respondent's dismissal was substantively fair on this charge as Motaung and conceded that the applicant did not state on the telephone that the winch had been fixed. In regard to the second charge, the refusal to bed a reasonable instruction to exchange the faulty switch, the arbitrator found that the reason given by the third respondent for not exchanging the switch was that he was waiting for his assistant. In the arbitrator view this did not demonstrate a refusal to obey the instruction. At most, it demonstrated that the third respondent delayed in applying the instruction. Third, the other turn into a distinction between a refusal to comply instruction and a failure to carry out the instruction. The evidence established at most, in the arbitrator's view, that the third respondent may have been derelict in his duties. In the absence of any evidence of any intention to deliberately refuse the instruction given to him, the arbitrator was of the view that the third respondent is not guilty of the charge against him and that his dismissal was accordingly and fair. In short, the arbitrator held that the third respondent had not articulated any intention not to obey the instruction.

[4] The grounds for review largely concern the arbitrator's assessment of the evidence led before him. In particular, the applicant contends that the arbitrator failed to take into consideration advice conduct, the third respondent that showed a clear intention to bathe instruction. In particular, the third respondent submits that the evidence discloses that the instructions given by the supervisor Motaung disclosed that instructions to fix the winch were given over a period of three days, during which the winch was not prepared. On the first day, 30 October 2012, the winch is not working on the third respondent was given an instruction to fix it. The third respondent advised the supervisor that there was a problem with the Breakers, that he had adjusted them and that the winch was working. However, the winch was not working. This resulted in a further instruction given on 1 November 2012. On this occasion, when he returned from underground, the third respondent advised Motaung that he had performed the required tests and that the winch was working. In fact, the winch was not working. Third instruction is given to the third respondent on 2 November 2012. On this occasion, the third respondent advised Motaung that there was a problem with the switch. Motaung instructed the third respondent to take a galley box switch in exchange the faulty switch. The third respondent did not do so. When the third respondent was again instructed to go underground and replace the supposedly faulty switch, respondent said that he would book the job for the night shift. The third respondent was advised that it was not the nightshift that was required to do the work, but that the third respondent was required to undertake the task. On Motaung's and disputed vision, the third respondent then turned around and walked away from him. It is also not disputed that when the instruction was given to another electrician to fix the winch, he was able to rectify the problem immediately. The fault was not with the switch as alleged by the third respondent; rather, cable damage was discerned. What the arbitrator failed property to consider was that of the act of turning his back on the supervisor proceeding to go without fixing the switch is required clearly amounted to an act of defiance amounting to a refusal to obey an instruction. This is particularly so in a context where at least three instructions had been given to the third respondent to repair the fault concerned.

[5] The test established by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) and

affirmed by the Supreme Court Of Appeal in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae [2013] 11 BLLR 1074 (SCA) empowers this court to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. What this amounts to is an outcomes-based enquiry, a stringent test aimed to ensure that this court is not likely to interfere with arbitration awards. The Labour Appeal Court has made clear that reasonableness does not equate to correctness and that a decision made by an arbitrator that is wrong will pass muster provided it is not so wrong as to be unreasonable (see *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) per Davis JA, who at paragraph 18 of the judgment emphasised the need to distinguish between reviews and appeals).

[6] The manner in which the review court should assess the evidence that served before an arbitrator to determine the reasonableness of the result was the subject of a judgment by the Labour Appeal Court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 197 (LAC). The LAC (per Waglay JP) held as follows:

> In a review conducted under section 145(2) (a) (ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to a process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award as improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.

[7] In other words, even if an applicant in a review application is able to identify some misdirection on the part of the arbitrator (for example, as in the present instance, a failure to consider material facts or to attach weight to relevant evidence or attach weight to irrelevant evidence and the like), that is not in

itself a basis for a review for want of reasonableness; the resultant decision must fall outside of a band of decisions to which a reasonable decision-maker could come on the same material.

[8] The LAC more recently affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the 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 (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In this judgment, Murphy AJA said the following:

> [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, 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.

[9] In my view, the arbitrator failed to have regard to the evidence before him. A reasonable decision maker would have concluded on the same evidence that

the third respondent refused to comply with a reasonable instruction. Insubordination (or a refusal to carry out an instruction) may assume a variety of forms. What the arbitrator ignored was the conduct of the third respondent and in particular his non-verbal actions, which clearly demonstrated an act of defiance. The evidence disclosed more than an innocent failure to comply with an instruction. The only inference to be drawn was that the third respondent was accordingly guilty of refusing to carry out a reasonable instruction.

For the above reasons, I granted the order reflected in paragraph 1 above.

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Van Niekerk J

Judge of the Labour Court

APPEARANCES

APPLICANT: Ms. G Mthalane, Solomon Holmes Attorneys
THIRD RESPONDENT: Mr. V Shongwe, AMCU