IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 11/2014

In the matter between:

NATIONAL UNION OF MINEWORKERS **Appellant**

GOODMAN MOKOENA **Second Appellant**

and

MOGALE GOLD, A DIVISION OF MINTAILS (SA) (PTY) LTD **Respondent**

Heard: **26 May 2015**

Delivered: **22 July 2015**

Summary: Review of arbitration award- employee dismissed based on inference drawn from circumstantial facts – employee dismissed for collusion of theft of gold –gold and refinery equipment found at other dismissed employees' homes - employer relying on unqualified lifestyle audit of employee and suspicious behaviour caught on video – Labour Court setting aside arbitration award. Appeal - Labour Court relying on circumstantial evidence - facts from which inferences are to be drawn must be true and proven - primary facts from which inference of collusion drawn not proven – no material evidence linking employee to the theft – video footage depicting no incriminating action - Labour .Court erring in reviewing arbitration award – appeal upheld.

Coram: Tlaletsi DJP, Landman *et* Sutherland JJA

Neutral citation: **Mokoena and Another v Mogale Gold, a Division of Mintails (SA) (Pty) Ltd** (LAC: JA 11/2014)

JUDGMENT

LANDMAN JA

[1] The National Union of Mineworkers and Goodman Mokoena (first and second appellants) appeal against an order of the Labour Court (Chenia AJ) reviewing and setting aside an arbitration award at the instance of Mogale Gold, a Division of Mintails (SA) (Pty) Ltd (the respondent). The appeal is with leave of the court *a quo*.

The facts

[2] The second appellant worked for four years as a plant attendant in the smelt house of Mogale Gold. Prior to his dismissal, he was working with two other attendants, namely Masemola and Sithole, the foreman and a senior security officer when he was suspended, charged with theft, attempted theft or collusion in the theft of gold.

[3] Employees assigned to the smelt house where gold is smelted, were screened for these positions. Their history is checked against Police records. They also undergo a polygraph test. Normally, only these persons are permitted to enter the smelter house but others also enter under escort. Employees are searched when they leave the smelt house.

[4] A metallurgical audit showed that all gold was not accounted for. There was a discrepancy of 3.5 kg. Jacobs, the Plant Manager, a metallurgical engineer, established that there was no process reason which accounted for the loss and

concluded that gold had been stolen. It is not clear whether the only avenue for this gold to be misappropriated was the smelt house.

[5] The smelt house consists of an entrance hall, furnace room and a storeroom. Jacobs inspected the smelt house and concluded that the three plant attendants, whose names have been mentioned above, were acting suspiciously. After the three had left the smelt house that day, Jacobs and Human, the Senior Security Officer, searched the smelt house and found in a cabinet, Vaseline, as well as a gold, concentrate rich cloth hidden in the wall of the smelt house near the entrance. The cloth was not supplied by the mine.

[6] A disguised camera (without a capacity to record sound) was installed in the smelt house. Later, Jacobs viewed the video and considered that the body language of the three attendants was suspicious. Human too thought their body language suspicious.

[7] The footage shows that while Mokoena and Masemola stood at the door, Sithole went into the storeroom and took something from underneath a pallet and put it in his right boot. Sithole then left the smelt house and went to the change room. An extract of the video was presented at the arbitration hearing and viewed by the arbitrator, then the court *a quo* and this Court. The video viewed by this Court does not depict what happened in the storeroom.

[8] After two days, the smelt house was again searched. Sithole's house was searched and gold and money were found there. Equipment used to wash and refine gold was found at Masemola's house.

[9] Nothing incriminating was found at the second appellant's home. Human testified that expensive furniture and clothing was found in his house. He testified that this could not have been acquired on the combined income of the second appellant and his wife.

[11] Several employees including Jacobs, the foreman Coetzee, Human, the security guard and the plant attendants underwent a polygraph test. According to Killian,

who did not personally administer the test, he is of the opinion that the polygraph results showed deception in the case of the second appellant.

[12] There has been a gradual improvement in gold accounted for since the suspension and dismissal of the three plant assistants.

[13] The second appellant denied that he had committed theft, or attempted to steal gold or that he colluded with Sithole and Masemola or that he knew of their activities. He failed a polygraph test because he was nervous. He had bought his furniture while previously employed and paid it off in monthly instalments. He said that the conversation captured on the video was about a disagreement with his wife. He viewed the video and did not think that it showed any suspicious behaviour.

[14] The arbitrator concluded that the employer had not proved its case and therefore found that the dismissal was substantively unfair. The arbitrator accepted that the second appellant's conduct may have inadvertently evoked a measure of mistrust but he found that the trust relationship had not been broken and therefore he reinstated the second appellant.

[15] The respondent launched an application to review and set aside the award.

[16] The court *a quo* held that the arbitrator:

(a) had considered the evidence on a piecemeal basis and rejected each piece of the evidence in a manner that is "not reasonable";

(b) failed to appreciate that the dispute was required to be determined on the basis of largely circumstantial evidence;

(c) made up his mind and attempted to analyse the evidence to justify his decision; and

(d) failed to apply his mind to the video evidence.

[17] The court *a quo* considered that it was not unfair of the employer to have ordered the second appellant to have undergone a polygraph test. This is correct as it was a term of his contract of employment. But the court *a quo* neglected to inquire into the accuracy and credibility of a polygraph test. No comment was made on the fact that the expert who formed an opinion that the second appellant showed deception did not himself apply the polygraph test.

[18] The court *a quo* viewed the video and found that the arbitrator did not apply his mind to the evidence and that his conclusions were not justified. The court *a quo* found that the video shows that the attendants were not working. But it is doubtful whether they were required to perform any duties at that stage when the foreman was engaged in firing up the furnace. The court *a quo* also opined that the attendants were looking around to ensure that no one else was around when one of them entered the storeroom.

[19] The court *a quo* found that the arbitrator's conclusion about what Sithole was doing was speculative but fails to record its own observations of Sithole's behaviour.

[20] The court *a quo* rejected the second appellant's evidence that the three attendants were discussing "women problems" saying that it was improbable that he would do this in the middle of a working day and have an involved conversation. But the arbitrator saw the witness and believed him.

[21] The court remarked that the arbitrator was naive when he decided that there was no direct evidence that the second appellant was guilty. But later found that it was correct that there was no direct evidence linking the second appellant to theft or the illegal removal of gold.

[22] The court *a quo* relied on evidence of a "lifestyle audit" that the second appellant and his spouse could not have financed the family's lifestyle. It is true that Human tendered such an opinion and referred to photographs but no lifestyle audit was

done. There was no proper attempt to value the clothing and furniture belonging to the second appellant's family.

Evaluation

[23] At the time that the dismissal was considered by the arbitrator, the issue had been narrowed to collusion although the arbitrator considered all the charges. There is no direct evidence of collusion. The respondent presented circumstantial evidence to the arbitrator. The arbitrator appreciated that this was the case. The approach to be adopted when an inference is sought to be drawn from other facts was summarised in *Cooper and Another NNO v Merchant Trade Finance Ltd.*[1]. Zulman JA observed that:

> 'It is not incumbent upon the party who bears the *onus* of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the 'two cardinal rules of logic' referred to by Watermeyer JA in *R v Blom* is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the *onus* rests he is entitled to judgment. If, on the other hand, an inference in favour

[1] 2000 (3) SA 1009 (SCA).

of both parties is equally possible, the litigant will not have discharged the *onus* of proof.'[2] [Footnote omitted]

[24] The facts from which an inference of collusion is sought to be drawn are the following:

(a) One of the three plant attendants entered the storeroom alone – the proposed inference is that his co-workers allowed him to do so in breach of the respondent's rule;

(b) The second appellant and Masemola are seen standing at the doorway/entrance to the smelt house – the proposed inference is that the two were so positioned to watch for the return of the foreman.

(c) The attendants appeared to be talking to each other.

(d) Plastic bags and Vaseline were found in the storeroom – proposed inference is that the gold particles were placed in the bags for illicit removal. The Vaseline was used to assist in inserting the bags of gold anally and that the gold was removed from the smelt house in this fashion.

(e) The three attendants worked in close proximity – it is to be inferred that the collection, secretion and removal of the gold could not be done without the second appellant noticing this.

(f) Gold was recovered from the home of Sithole and refining equipment from Masemola's home. These attendants stole the respondent's gold.

(g) Furniture and clothing was found in the second appellant's home and Human testified that the second appellant and his wife were unable to afford these items and the inference is that these items were acquired with illicit income.

(h) The second appellant attended the criminal trial of his two co-workers.

[2] At para 7; 1027E – 1028D.

(i) The second appellant failed a polygraph test and the inference is that he showed signs of deception.

[25] The facts from which inferences are to be drawn must be true and proven. Although all the facts must be considered holistically, it is necessary to examine the facts to establish that they are true and proven. Secondly, as the inference of collusion also involves drawing an inference from other facts that are themselves inferences from the primary facts, these initial inferences must be interrogated. Only when the proper facts including the inferences made from those facts have been satisfactorily established, may the final inference of collusion be attempted.

[26] It may be accepted that certain rules were put in place by the respondent that applied to the workers in the smelt house. But, it seems that, regardless of the rules, there was a common practice in the smelt house to ignore some rules. The storeroom was not kept locked and the foreman would have observed it as the video shows. The foreman and the attendants ignored any rule regarding the use of cellphones and that no one should enter the storeroom unaccompanied. The security officer presumably did not react to the employees carrying cellphones into the smelt house. The fact that the second appellant and the other attendants broke the rules is therefore not particularly significant.

[27] In drawing an inference from the facts, it must be borne in mind that we do not know what duties, if any, the three attendants were obliged to be performing at the time reflected on the video. Objectively, it cannot be said that the second appellant and Masemola were keeping a lookout.

[28] The plant attendants were talking either with each other or in groups of two and some were talking to the foreman. There is no evidence by the respondent as to what they were talking about. The second appellant testified about what they were talking about. His explanation in the absence of any contrary suggestion is plausible and he was believed by the arbitrator.

[29] It may be also accepted that Vaseline and packets together with gold and equipment found at the homes of Sithole and Masemola demonstrate that gold could be illicitly removed using this method and probably was used to do so.

[30] We do not know if other attendants were also employed in the smelt house. It is hardly plausible that two attendants could not do what it is suggested they did without some knowledge of their activities by the second appellant.

[31] The furniture and clothing found in the second appellant's home was not valued by an expert nor was any investigation done as regards when the items were acquired or how and what was paid for them. It may be accepted that the second appellant attended the trial of his co-workers. This is highly suspicious.

[32] One fact which tends to diminish to a degree the inference sought to be drawn is the fact that thefts continued and the loss gradually diminished after the suspension and dismissal of the three co-workers.

[33] Finally, the testimony of the second appellant that he did not know of the theft and did not collude with his co-workers was accepted by the commissioner. In spite of the probabilities, a court or tribunal may believe a witness and find that the truth lies in that testimony. This Court has not had the opportunity of viewing the second appellant giving evidence. So, although I am inclined to accept that the most plausible inference on the respondent's evidence is that the second appellant must have and therefore did have knowledge of the theft of gold in the smelt house, the primary decision-maker is the arbitrator and he had all the advantages of hearing the witnesses. This being an appeal concerning a review, I am unable to say the arbitrator's decision was not one that a reasonable decision-maker would not reach. In the circumstances, the appeal must be upheld.

[34] Reinstatement is the primary remedy for an unfair dismissal. The arbitrator formed the impression that the trust relationship had not broken down and ordered reinstatement. There is no cause to interfere with this order.

Order

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

1. The appeal is upheld with costs.

2. The judgment of the Labour Court is set aside. It follows that the award stands. The award reads:

'1. I find that the dismissal of the applicant was substantively unfair.

3. The respondent is to reinstate the applicant on the same terms and conditions as he enjoyed prior to his dismissal.

4. The order of reinstatement shall operate retrospective to the date of the applicant's dismissal on 24 April 2009.

5. The respondent is to pay the applicant backpay for the period between the date of dismissal (24 April 2009) and the date he resumes services (01 April 2010).

6. The respondent must pay the applicant the sum of R36 949.00 (thirty six thousand nine hundred and forty nine Rands) being the equivalent of 11 months arrear remuneration. This amount must be paid on or before 31 March 2010.

7. The applicant is ordered to report for duty at Mogale Gold (Pty) Ltd, Krugersdorp and to report to Mr Bryan Willemse, Human Resources Manager, on 01 April 2010.

8. Since no costs were sought by neither party, none is ordered.'

3. The second appellant is ordered to report for duty at the Respondent's premises within 14 days of delivery of this judgment and the respondent is order to pay the arrear remuneration (back pay) owing as from 24 April 2009 within 21 days of this order.

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AA Landman JA

Tlaletsi DJP and Sutherland JA concur in the judgment of Landman JA

APPEARANCES:

FOR THE APPELLANTS: Mr Makinta of E S Makinta Attorneys

FOR THE RESPONDENT: Adv F A Boda

Instructed by Norton Rose Fulbright South Africa