IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NUMBER: JR 2537/03

Heard : 14/09/07

Delivered: 28/9/07

In the matter between:

RSA GEOLOGICAL SERVICES DIVISION OF
DE BEERS CONSOLIDATED MINES LTD **APPLICANT**

And

J. G. GROGAN **RESPONDENT**

JUDGMENT

Introduction

1. What is derivative misconduct? Can an employer dismiss a group of employees if it proves that some from amongst them committed misconduct, but it cannot identify the culprits? These questions arise in this review and counter review of a private arbitration award issued in respect of fifteen employees dismissed for misconduct.

Background to the Dismissal

2. The applicant employer, a division of De Beer Consolidated Mines Ltd, operated the Kimberley Micro Diamond Laboratory (KMDL). KMDL tested kimberlite sample to determine whether they were diamondiferous. Such

tests informed clients of KMDL of the quantity of diamond in the kimberlite so that they can invest resources appropriately. The tests involved long, tedious, difficult and dangerous processes which had to be executed meticulously for accurate results.

3. Diamonds that were recovered were registered and kept in a safe. KMDL had to keep the remainder of the kimberlite because discarding it would have distorted the results and consequently the reports to the clients.

4. In April 2002 the management received information from a secret informer referred to as “X” that kimberlite sample was being dumped down two boreholes. X submitted to a polygraph test which did not show that he was being deceptive. The boreholes were excavated and 453kg of kimberlite was extracted; more still remained in the boreholes. It was stored in the sample bags and bore the tags from the sample bags. Hence it was common cause that the kimberlite came from sample that had been discarded.

5. The security interviewed all the employees about the discarded kimberlite. None volunteered any information. After three interviews and a polygraph test employee Adam Chaka, admitted throwing sample down the borehole. He also implicated David Besent and Joel Monnedi.

6. The security invited all the employees to submit to polygraph tests on the basis that if the results showed no deception they would not be investigated further. After initially agreeing, the employees withdrew their consent to be tested on the advice of the Union, the National Union of Mineworkers (NUM), the first respondent.

7. Victoria Ziegler, the process manager of KMDL, warned the employees that if they were withholding information about discarding the sample they could be dismissed. She invited them to telephone a number which they could use to contact the manager anonymously. None did.

8. Ziegler and the Human Resources Manager urged the employees again to co-operate with the investigation. They collectively refused to assist as they denied knowing anything about discarding sample. Ziegler suspended them. Together with their letters of suspension she gave them letters bearing a telephone number for contacting the employer anonymously. All the employees returned the letter with the telephone number.

9. The employees attended a disciplinary enquiry on 1 and 2 July 2002. Stephen Barclay, an employee from another De Beers mine, chaired the enquiry. The employees were found guilty and dismissed. Their appeals were unsuccessful, as was conciliation before the Commission for Conciliation, Mediation and Arbitration (CCMA). They referred the dispute to private arbitration.

Terms of Reference

10. The parties conferred on the arbitrator the power firstly, to issue a final and binding award subject to review on the same grounds on which the Labour Court reviews awards of the CCMA. In so doing the parties mandated the arbitrator to issue an award that met the standards set for CCMA awards. Counsel for the parties confirmed that the standard for review in this case is the usual grounds for reviewing CCMA awards and includes testing the award for rationality and justifiability.

11. Secondly, the parties required the arbitrator to determine whether the dismissal of the employees, the third respondents, was procedurally and substantively fair and to award any relief as a CCMA commissioner would in terms of sections 193 and 194 of the Labour Relations Act, No 66 of 1995 (LRA).

Arbitrator's reasons and findings

12. The arbitrator identified for determination the following questions:
    a. whether any of the dismissed employees discarded sample, or failed to assist the employer in identifying the perpetrators who had discarded sample.
    b. whether dismissal was justified for either of the above offences.

13. He determined these issues in respect of each employee as follows:

    a. Chaka's dismissal was fair because he admitted freely and voluntarily that he threw at least three bags of kimberlite down the boreholes. Furthermore, he refused without explanation to testify at the disciplinary enquiry and arbitration.[1]

    b. Besent's and Monnedi's dismissal was fair because Chaka implicated them. Furthermore, Besent refused to testify at the arbitration. Although Monnedi testified, he failed to challenge Chaka at the disciplinary hearing and the arbitration. He did not explain why Chaka would implicate him falsely. He was implicated in a

1 Para 18 of Award

"conspiracy of silence" amounting to "residual misconduct". [2]

c. E Sonaba's and Jacob Williams' dismissal was fair firstly because the evidence pointed strongly to employees additional to the three identified above participating in discarding sample. Secondly, Sonaba and Williams worked overtime when the discarding occurred and stood to benefit from being paid a bonus for reducing the backlog. Thirdly, Williams was the supervisor of the overtime team. They participated in disposing of the sample; if not, they had information that would have assisted the employer identify the culprits.[3]

d. Gladys Mashodi and Virginia Tokelo were dismissed unfairly because it was improbable that they could have "physically associated with the culprits in the disposal of sample".[4] Furthermore, the employer failed to prove on a balance of probabilities that they had information that could have assisted the employer.[5]

e. Likewise, B Giwu, M T Mhlangu, LT Mhlaba, J Molamu, Z J Mpampi, and W K Sekutenyane were dismissed unfairly because the employer did not prove that they had information that could have assisted the employer.[6]

f. N Makaleni was dismissed unfairly because he was employed in another team when the offences were committed. He did not work

2 Para 22 of Award
3 Para 23 of Award
4 Para 24 of Award
5 Para 42 of Award
6 Para 42 of Award

overtime. Although the arbitrator suspected that he knew or might even have taken part in the "illicit activities", the balance was not tipped against him as a result of his failure to testify.[7]

g. Frankie Lephoto, the superintendent of KMDL, was dismissed unfairly. The employer had submitted that Lephoto would have been aware of sample being discarded because he worked overtime. Furthermore, he had a surveillance camera in his office. By carrying out his supervisory functions capably he would have uncovered the scam. The arbitrator rejected the last submission because Lephoto, he said, was not charged for poor performance. He also found that the employer did not prove that Lephoto worked overtime. Furthermore, he could not find him guilty merely because he refused to undergo a polygraph test as that did not prove that he had something to hide.[8]

Grounds of Review

14. As indicated above, the parties agreed that the award, despite being issued in a private arbitration, is reviewable on the additional constitutional ground of justifiability.

15. Counsel for the parties acknowledged that in determining the issues in dispute the arbitrator applied two criteria namely, the period when the sample was discarded and the motive for discarding them.

16. Mr Redding, counsel for the employer, submitted that these criteria were

7 Para 43 of Award
8 Para 44 of Award

incorrect. By relying on them the arbitrator issued an award that was not justifiable on the facts. The first criterion was incorrect because the arbitrator set March 2000 as the end of the period during which sample was discarded when the evidence showed that the dumping continued until May 2002.[9] The second criterion was incorrect because the arbitrator relied only on the financial motive of the employees without considering a non financial motive proffered by the employer. The financial motive was payment for overtime and a potential bonus if the employees eased the backlog. The non financial motive that the employer witnesses suggested was that discarding the sample would have reduced the admittedly unpleasant workload, made work easier and allowed the employees more time to relax. By limiting the timeframe to March 2000 and the motive to financial benefits, the arbitrator irregularly and unjustifiably exculpated the reinstated employees.[10]

17. For the employees, the two criteria were the cornerstones of their defence.

Analysis

18. The two criteria arose from the submissions of Dr Cloete, counsel for the employees, and the evidence of Lephoto.[11] The court accepts that the arbitrator relied on them to demarcate those who probably participated in and knew about discarding the sample, from those who possibly knew about this from discussions in the workplace.[12] Using these criteria as a basis for the distinction is rational, provided the information before the arbitrator justifies it.

9 Para 40 of Applicant's Heads of Argument
10 Para 42-44 of Applicant's Heads of Argument
11 Para 41 and 38 respectively of Award
12 Para 37, 41 and 42 of Award

19. All the evidence before the arbitrator showed that the timeframe when the discarding of the sample began and ended could not be established precisely.[13] According to Chaka's confession, the plan to discard sample was hatched in July 2000. The undisputed evidence was that between March 2000 when the boreholes became disused and May 2002 when the boreholes were drilled, borehole number 6 was filled with kimberlite at least twelve metres above the water table. This proved that the discarding continued after March 2000. Coupled with the undisputed evidence that the quantity of sample recovered exceeded 453 kilograms and could possibly have been as much as two tons, the only reasonable inferences to be drawn were either that the discarding involved many more than the five dismissed employees, or that it was carried out over a long time, or both.

20. Dr Cloete conceded that the discarding continued after March 2000 when the employer discovered the boreholes to be blocked, and October 2000 when Giwu, Molamu and Mpampi were employed.[14] He also acknowledged that the discarding must have taken place before March 2000 as it caused the boreholes to become blocked.[15] He nevertheless persisted that these undisputed facts set apart those employees who were employed in October 2000 and January 2001 from those who were employed before them.

21. The arbitrator too acknowledged that the exact period when the sample was discarded was not known. For reasons that do not emerge from the award the arbitrator fixed the timeframe when the discarding occurred as

13 Para 36-41 of Applicant's Heads of Argument; Record pages 1232, 1077, 1078, 1095, 1100, 1103, 1104
14 Para 7.3 of Second and Third Respondent's Heads of Argument
15 Para 7.4 of Second and Third Respondent's Heads of Argument

being between 1999 and early 2000. The evidence does not, with respect, justify the arbitrator's finding.

22. The employer established on the probabilities that a huge amount of sample was discarded between 1999 and May 2002 when circumstances were such that only the employees could have discarded it. These facts also proved *prima facie* that many employees could have taken part in discarding the sample. According to Lephoto's evidence and Chaka's confession, the backlog was cleared by August 2000. As the discarding continued thereafter, it can be inferred firstly, that the motive was not necessarily financial. Secondly, opportunity for discarding the sample existed even when the employees worked normal time. Having regard to the possibility that discarding took place during normal working time and the scale of the scam, all the employees could have known about it. With these facts and inferences from facts the employer had proved *prima facie* that all the employees participated in the scam and were aware of it.

23. The next stage of the enquiry was to assess whether the employees rebutted these facts and inferences effectively and if not, whether the employer succeeded in elevating its *prima facie* proof to conclusive evidence sufficient to discharge its onus of proving the fairness of the dismissal on a balance of probabilities.[16] It was common cause that if the employer proved that the employees committed the offence, dismissal was the appropriate sanction.

24. The confession put the dismissal of Chaka and Besent beyond dispute. No more need be said about the substantive fairness of their dismissal.

16 L H Hoffmann and DT Zeffertt *The South African Law of Evidence* (1992) 596

25. The confession also implicated Monnedi. Mr Cloete submitted that by testifying Monnedi gave a reasonable explanation as to why the confession should not apply to him. The confession was unreliable in relation to Monnedi because it was coerced. Furthermore, once Monnedi testified, his evidence should have been preferred over the confession as Chaka did not testify. So submitted Dr Cloete.

26. Monnedi explained that he did not attempt to persuade Chaka to withdraw his confession because it would have made no difference as the confession was already part of the disciplinary process. His explanation did not go far enough to clarify why Chaka would implicate him in the first place. Furthermore, if the confession was coerced it had to be rejected in respect of all the employees implicated by it, and not in relation to Monnedi alone. Neither the union nor Chaka and Besent contested the validity of the confession.

27. Chaka confessed that Monnedi was present when Besent and Moremani told him that sample should be thrown away. This established that Monnedi was aware that Chaka and Besent could be involved in the scam. As regards Monnedi therefore, there was direct evidence that he was aware of the scam and failed to co-operate with the employer to stop it. With regard to the rest of the employees, whether they knew about or participated in it must be determined from all the circumstantial evidence.

28. The circumstantial evidence was the following :

    a. Chaka confessed to discarding about three bags of sample. Each bag weighed about 20 kilograms.[17] Three inferences arise. Firstly,

17 Chaka's confession vol 1 p150; Ziegler's Closing Argument at Disciplinary Enquiry vol 3 p722

many employees other than Chaka and Besent had to be involved in discarding the sample to accumulate to more than 453 kilograms. Secondly, an adult, male or female, can carry 20 kilograms. The cleaners, Mashodi and Tokela, were therefore not necessarily precluded by their physique from participating in the misconduct or associating with the culprits. Thirdly, the discarding could not have taken place exclusively when overtime was worked, nor was it confined to two months (July and August) referred to in the confession. The Basic Conditions of Employment Act No 75 of 1997 precluded employees from working longer than ten hours per week. It could have taken longer than two months of overtime work for two workers (Chaka and Besent) or even five workers (add Monnedi, Sonaba and Williams) to dispose of 453 kilograms of sample.

b. Moshodi made tea. The tea room opened out to one of the boreholes. Tokele washed the clothing of some of the employees. This entailed walking around the boreholes several times a day. Moshodi and Tokele covered for each other when one of them was on leave. They could have seen sample being discarded.

c. The boreholes were close to and easily visible from KMDL. Employees could have seen sample being discarded.

d. The employees worked closely as a small team and took their meal breaks together. They could have discussed the discarding of sample.

e. After the scam was discovered, the employees refused to undergo

polygraph tests. They could have had something to hide.

f. They collectively returned the note bearing the telephone number for giving the employer information anonymously. Ziegler inferred that they were being defiant. Another inference is that they had resolved to stand by each other. By handing back the notes, the culprits limited the risk of any employee succumbing to the employer's appeal for information.

29. The employees do not dispute any of the facts on which these inferences are drawn. They dispute only the inferences.

30. The only credible rebuttal of all the circumstantial evidence was Lephoto's explanation that the union had advised them against undergoing the tests. Polygraph testing is notoriously controversial. The union probably did advise the employees not to submit to it. The employer did not challenge this evidence. The court cannot draw any adverse inference from their withdrawal of consent to undergo the tests.
31. The defence that Moshodi and Tokele could not have known about the scam because they did not work overtime fell apart once Lephoto acknowledged under cross-examination that they did work overtime.

32. All the remaining inferences stand firstly because none of the employees testified except for Monnedi and Lephoto. Secondly, Even though Lephoto and Monnedi testified, on the material question as to whether they participated in or knew about the scam, their evidence amounted to a bare denial. As such, it cannot withstand the undisputed evidence for the employer. Once the employer established the scale of the scam, that it was perpetrated over a long time and during normal working hours, the

burden of rebuttal fell to the employees to explain why they could not see the sample being discarded, why they could not have known about it, but most of all, why they handed back the note with the telephone number for information and refused to assist the employer. The evidence for the employer called for an answer which the employees were best placed to give. But they refused to testify.

33. Anyone who was innocent would have testified as the risk of losing one's job was great. A compelling explanation would have been that discarding sample was serious misconduct; anyone who was involved would not have let others know about it. None gave that explanation to the arbitrator.

34. Lephoto also lacked credibility. As the KMDL superintendent, Lephoto denied that he was at KMDL when overtime was worked, that he used the surveillance camera in his office to supervise the employees and that he walked about KMDL to supervise the employees. None of these denials have any ring of truth.

35. Lephoto was specifically responsible for monitoring the activities of the employees. He denied that he worked overtime as he was not paid overtime. He further contended that it served no purpose for him to be at KMDL when Williams was delegated the task of supervising the overtime team. If Lephoto did not work overtime, then the leaching would not have been subjected to quality control (discussed below) as he would not have been there to spike the samples. Furthermore, he would have been paid a bonus of R8000,00 for doing nothing to clear the backlog. Lastly, Owen Garvie, to whom Lephoto reported, must have been lying when he testified that Lephoto put in many extra hours when there was no evidence as to why Garvie would falsely implicate Lephoto.

36. Lephoto's office was equipped with a surveillance camera which was focused on the facility where the kimberlite was acid leached. The purpose of the camera was a safety measure so that he would be able to respond instantly if there was any risk to the employees. When he was not there, no one monitored the camera, he testified. On his version the court must infer that the safety of the overtime team was not supervised. This is most unlikely as the employees worked with acid and other high risk substances involving dangerous processes. Furthermore, as a tool for monitoring the safety of the employees, Lephoto had to look at the camera regularly and not when he wanted to or when he had time as he testified.[18]

37. As a superintendent, he could not have confined himself to his office; he must have walked about KMDL. He could not have delegated the task of supervising the employees to Williams without periodically checking that Williams himself was doing his job.

38. Lephoto had to make these denials, otherwise he could not explain why he did not know about the scam. He must have known about it from simply carrying out his supervisory responsibilities.

39. He had to check whether the employees were processing the kimberlite properly by "spiking" the sample with synthetic diamonds. Thus if he spiked the samples with ten synthetic diamonds he had to recover all ten as a quality check on the processes. He could not have been recovering all the spikes as the employees were discarding the kimberlite. He would have known from this that something untoward was going on.

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18 Transcript vol 4 p1527

40. He had to study reports from which he would easily have seen that as much as 26 aliquots were leached on 3 June 1999 when no overtime was worked and 16 samples were treated when overtime was worked on Saturday 27 August 1999. It was impossible to treat more than 8 aliquots on a day when overtime was worked. On several occasions the reports showed that more aliquots were treated than was possible. From this Lephoto should have deduced that employees were not following procedures. He tried to absolve himself from the June discrepancy by testifying that it was before he was employed. When he was reminded that he was employed on 3 May 1999, he fumbled for another explanation. As he received and studied the monthly production reports for KMDL he should have detected a discrepancy between the samples received for processing, the quantity processed and the yield per sample.

41. The employer tendered this evidence not to prove a charge of poor performance but to show that Lephoto had systems in place to enable him to know whether the employees were discarding sample. Lephoto did not dispute that these systems were in place. To rebut the inferences that the employer urged the court to draw from these undisputed facts he had to show why the systems did not work to uncover the scam.

42. There were three systems in place to enable him to carry out his responsibility of ensuring that the sample was not discarded: the surveillance camera, spiking the samples and studying the reports. He had to explain why all three failed him. He did not concede that he was negligent or that he was a poor performer. His poor performance was therefore no explanation for his ignorance about the goings on in KMDL. The arbitrator could also not reasonably draw that inference in the context where the scam continued over a protracted period in a close knit

environment involving several employees and when systems were in place to safeguard against it.

43. Lephoto's bare denial was not an adequate answer to the *prima facie* evidence adduced for the employer. The arbitrator should not have accepted it and exculpated him from the offences for which he was charged on the basis that he did not do his job properly.

44. The arbitrator summarised the position of the parties and his statement of the law thus: He acknowledged that the employees were not expressly charged with refusing to assist the employer to identify the culprits. He nevertheless accepted that such willful non-co-operation "can in the labour context constitute 'association' with the culprits of a type sufficiently close to be covered by the charges". Employees deliberately withholding information about the scam would, he concluded, be guilty of residual misconduct of the kind contemplated in *ABI* and *Lesson Motors*.[19]

45. Based on this summation, the union did not challenge the substantive dismissal of those implicated in the confession and those who worked overtime. As Sonaba and Makaleni also worked overtime, Dr Cloete correctly conceded on their behalf that they were not entitled to the relief that the arbitrator awarded. They should also have been dismissed.

46. Dr Cloete however, disputed that the concept of "derivative misconduct" espoused in *ABI* and *Leeson Motors* was relevant to the circumstances in this case as in those cases the LAC found that the employees were co-perpetrators and relied on the doctrine of common purpose.[20]

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19 *FAWU and Others v ABI* (1994) 15 ILJ1057 (LAC) per Nugent; *Chauke and Others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) per Cameron; Para 28 of Award

20 Para 6.1 and 6.2 of Respondents' Heads of Argument

47. *ABI* and *Leeson Motors* are relevant to this case because in all three cases the employers proved the principal misconduct and that some employees from a group incontestably participated in it. The employers had no direct evidence of which employees participated in, lent their support to, associated themselves with or knew about the misconduct. On the facts in *ABI* Nugent J inferred that a group of some 100 employees were present when an assault took place on a casual worker employed during a strike, and that they either participated in or lent their support to it.[21] On the facts in *Leeson Motors,* Cameron JA drew the primary inference that a group of 20 employees all participated in a campaign of sabotage.[22] In all three cases the employees refused to assist the respective employers with information to investigate the misconduct; they also refused to testify subsequently at their disciplinary enquiries; the evidence of the two witnesses who did testify in *Leeson Motors* was rejected. The LAC confirmed the dismissals in *ABI* and *Leeson Motors.*

48. The LAC decided both *ABI* and *Leeson Motors* by applying elementary rules of evidence to a civil case to determine the dispute on a balance of probabilities. In neither case did the LAC apply the concept of "derivative misconduct". The term appeared for the first time in labour misconduct jurisprudence in *Leeson Motors*. Cameron JA described it as a form of misconduct that is inferred from the employees' failure to offer reasonable assistance to an employer to detect individuals actually responsible for the misconduct. The dismissal for derivative misconduct is justified, he opined, because it is a violation of the relationship of trust and confidence.[23]

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21 P1064 of *ABI*
22 Para 41 of *Leeson Motors*
23 Para 33 of *Leeson Motors*

49. In the opinion of this court, derivative misconduct may diminish the culpability of the employee for the principal misconduct. In no way does it diminish the standard of proof. The employer must prove on a balance of probabilities that the employees knew or must have known about the principal misconduct and elected without justification not to disclose what they knew. If the employer discharges this onus then it may well, as in this case, also discharge the onus of justifying the dismissal on the principal misconduct of participating in, lending support to or associating themselves with the offence. In this case all the employees were charged with the participating in the principal misconduct. On the facts the court must infer that all the employees participated in the principal misconduct in the absence of their evidence to the contrary. Derivative misconduct may therefore be an appropriate charge if employees who participated in the principal offence can be distinguished from those who knew about it. That distinction cannot be made in this case. As the employees failed to discharge the burden of rebuttal, the court must find that they all probably knew about the scam and participated in it.

50. The employer's challenge is to the arbitrator's application of the summation to the evidence. The basis on which the arbitrator demarcated the guilty from the innocent employees was the criteria he set, namely the timeframe during which the discarding occurred and the financial motive. As the employer established that the evidence did not support the criteria, it follows that they cannot be relied on to distinguish employees who participated in or knew about the scam from those who did not. The arbitrator's finding was therefore based on a mistake of fact that is foundational to his reasoning.[24] He used incorrect criteria for determining

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24 *Hira and Another v Booysen and Another* 1992 (4) SA 69; *Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C)

the conduct the employees.[25] As such, the mistake amounts to a reviewable irregularity.

51. Against this finding all the grounds in the counter application for review must fall away, save the issue of procedural unfairness. Only one ground of procedural unfairness was raised during the arbitration. It related to not allowing the employees to cross examine the informer at the disciplinary enquiry. The relevance of the informer's information to the case against the employees was that it led to an investigation which uncovered the scam. Even if they were prevented from cross-examining the informer, the employees suffered no prejudice as they did not dispute subsequently uncovered facts.

Order

52. The application for review is granted with costs.
53. The counter-application for review is dismissed with costs.
54. Paragraphs 2-4 inclusive of the arbitrator's decision is substituted as follows:

"The dismissal of the remaining 10 employees is also fair.

Dated 28 September 2007

Pillay D, J

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25 *S A Veterinary Council and Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA) at 35-37; *Bam-Mugwanya v Minister of Finance and Provincial Expenditure and Others* 2001 (4) SA 120 (Ck) at 36