

# NEWSLETTER

## Zama Zama

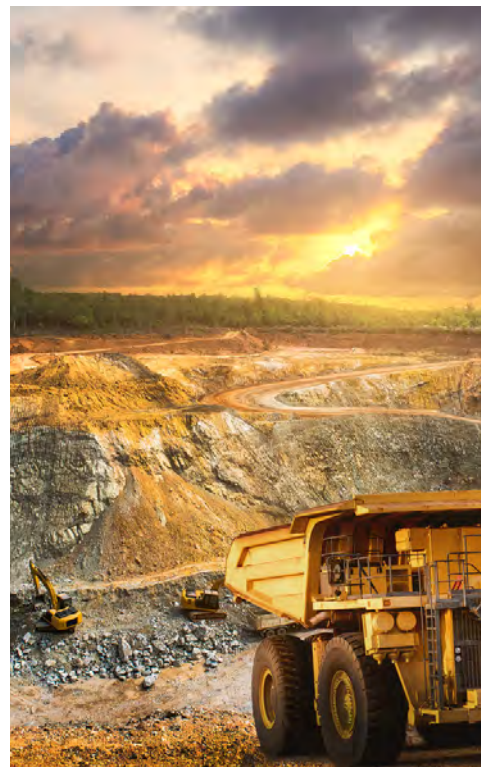
### *The Crucial Role of Substantial Evidence in Establishing Guilt*



Welcome to our latest legal newsletter. In this edition, we delve into a case that sheds light on a pressing issue affecting South Africa – the challenge of illegal mining, commonly referred to as "zama zamas." Amid the ongoing pandemic, the mining sector has been particularly vulnerable, with unauthorized mining activities exacerbating infrastructural challenges. We explore the recent case of Harmony Gold Mining Company Limited v Commission for Conciliation, Mediation and Arbitration and Others (JR1457/19) [2023] ZALCJHB 210 (10 July 2023), which underscores the need for cautious consideration before dismissing employees in such circumstances.

### **BACKGROUND:**

The case revolves around an application seeking to review and set aside an arbitration award issued by the Commission for Conciliation, Mediation, and Arbitration (CCMA). The applicant, Harmony Gold Mining Company Limited, also seeks the reinstatement of a lapsed review application due to procedural lapses. The matter pertains to the dismissal of Mr. Morokeng, a former employee, on allegations of dishonesty and failure to report for duty. The basis for the allegations was Morokeng's alleged involvement in assisting an illegal miner to exit the underground mine.



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## THE REINSTATEMENT LABOUR COURT APPLICATION:

Harmony Gold's application for condonation and reinstatement stems from its failure to timely file a replying affidavit. The applicant attributed the oversight to a genuine error, promptly rectified upon identification.

The court considered the interests of justice, degree of lateness, explanation provided, prospects of success, and case significance. Given the reasonable explanation and prompt corrective action, the court decided to condone the delay and proceed with the review on its merits.



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### THE EVIDENCE:

The evidence before the Commissioner revealed that Harmony Gold's investigating officer received information about Morokeng and his colleague exiting the mine with gold-bearing material. Morokeng was detained and searched, yielding no evidence of wrongdoing. However, it was alleged that an "escort" accompanying Morokeng was an illegal miner. Subsequent investigations indicated that the "escort" had no official record of entering the mine through the turnstiles. Despite this, the Commissioner concluded that Harmony Gold had failed to prove Morokeng's guilt.

### THE ARBITRATOR'S AWARD:

The Commissioner found that the evidence presented by Harmony Gold's investigating officer was hearsay, as it relied on statements from individuals who were not called as witnesses and had not been cross-examined. The Commissioner also questioned the fairness of the investigation. Consequently, the dismissal was deemed unfair, and Morokeng was ordered to be reinstated retrospectively with back payment.



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## MISCONDUCT AND MISDIRECTION:

Harmony Gold sought to review the arbitration award, asserting that the Commissioner committed misconduct and misdirection by relying on inadmissible hearsay evidence and failing to provide adequate reasons for the decision. The court examined the admissibility of hearsay evidence and concluded that the Commissioner's reliance on such evidence was a material irregularity, depriving the employee of a fair hearing.

## CONCLUSION:

In light of the evidence presented and the legal considerations at hand, it is imperative to address the contention that the Commissioner failed to consider the gravity of the rule against abetting illegal mining activities. However, it is evident from the Commissioner's acknowledgment of the severity of issues arising from illicit mining operations that this contention is unfounded.



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Based on these determinations, it becomes apparent that the Commissioner's award, grounded in the available evidence, was well within the bounds of reasonableness. Consequently, the review application must be deemed unsuccessful in light of these considerations.

This case serves as a reminder that employers, particularly in the mining industry, must navigate issues surrounding illegal mining judiciously. Adequate and fair investigation procedures, as well as the admissibility of evidence, are paramount to ensuring just outcomes.

**Disclaimer: Our newsletter offers general information and does not constitute legal advice. For tailored guidance based on the facts of your case consult a qualified attorney.**

