IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: JR 614/16

In the matter between:

FOOD AND ALLIED WORKERS UNION **First Applicant**

M. MAKWABE **Second Applicant**

and

COMMISSION FOR CONCILATION, MEDIATION AND ARBITRATION **First Respondent**

M PHALA *N.O.* **Second Respondent**

SOUTH AFRICAN BREWERIES LTD **Third Respondent**

Heard: 17 May 2017
Delivered: 06 June 2017
Summary: Review Application- Test for review application restated.

JUDGMENT

MABASO AJ

Introduction

[1] The question that has to be determined in this review application is: whether the arbitrator considered the principal issue before him, evaluated the facts properly presented (both orally and documentary) at the hearing and came to a conclusion that is reasonable.[1] In order to decide on this, I need to remind myself that the arbitrator was required to deal with the "*substance of a dispute between the parties*".[2]

[2] In this matter, the parties are: the first applicant is Food and Allied Workers Union (the Union), the second applicant is Masixole Cecil Makwabe (the employee). The first respondent is the Commission for Conciliation Mediation and Arbitration (the CCMA), the second respondent is the Commissioner of the CCMA (the arbitrator), and the third respondent is South African Breweries Ltd (the employer). The CCMA and the arbitrator are not opposing this application. However, the employer is.

[3] The applicants, according to the notice of motion, are seeking: to review and set aside to the arbitration award issued by the arbitrator under the auspices of the CCMA dated 24 February 2016 under case number GAJB 5980/15; and that the dismissal of the employee by the employer be declared to be procedurally and substantively unfair; alternatively, to direct that the dispute between the employee and the employer be referred to the CCMA for a *de novo* hearing, before a different commissioner other than the arbitrator; and that a costs order be made against any party opposing this application.[3]

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[1] *Herholdt v Nedbank Ltd* [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA); *Head of the Department of Education v Mofokeng and Others* [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at paras 30-33.

[2] *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC); 2009 (1) BCLR 1 (CC) at para 65.

[3] Paginated index: Page 2.

Relevant background

[4] At the time of dismissal on 23 February 2015, the employee was employed by the employer in the capacity of Customer Relations Representative and held a position of a shop steward, and was also a trustee of South African Breweries Medical Aid Trustees. The employee was accused and investigated by the employer, following allegations that he had been in possession of a hired vehicle (the car), from Budget Car Rental (the service provider) between the period of 20 and 22 September 2014 without the necessary authorization from the employer. The employer issued the employee with the charges and summonsed him to a disciplinary hearing to answer to the following charges:

> "(1) Gross misconduct in that you were in possession of a hired vehicle from Budget from the 20 September to the 22 September 2014 under the SAB name without permission/authorisation,
>
> (2) Gross misconduct and/or Dishonesty and/or Bringing the company's name into disrepute in that you failed to disclose damages to the hired vehicle to the Company or Budget Car Hire."

[5] He was then found guilty, on both counts, and his contract of employment with the employer was terminated on the basis that he committed misconduct. Subsequently, the employee being assisted by the Union declared an unfair dismissal dispute against the employer, at the CCMA. Following the unsuccessful conciliation, the matter was referred to arbitration wherein the arbitrator was appointed to arbitrate the dispute between both parties.

The arbitration hearing and the outcome thereof

[6] Below, I propose to deal only with the evidence in respect of charge 2 taking into account, that the arbitrator ruled that the employee did not violate a rule in respect of charge 1. Before the arbitrator, the following evidence was presented.

[7] The first witness for the employer was Mr Van Der Merwe, who stated that: he works as an Operational Manager for CIC; this job entails that he oversee the

team leaders for the southern part of the employer; following allegations against the employee, he was tasked to investigate them in the following manner. He spoke to one Belinda Phillips, of the employer, who advised him that she did not authorise that the employee was to have the car – that has been hired from the service provider – between 20 and 22 September 2014. According to her, the car was to be used by the employee until 19 September 2014. Through this investigation, he discovered that the car had been damaged.[4]

[8] He made contact with Ms Chantelle Husband/Cooper (Ms Chantelle), an employee of the service provider, who was working on this matter. Ms Chantelle advised him that the car was returned on Monday evening, 22 September 2014, and it had been damaged, and there was *"…wet paint and the next day when he checked the vehicle that there was damage to the vehicle and they called us in to obviously discuss the matter"*.[5]

[9] Ms Chantelle further advised him that the vehicle had been scheduled to be returned by Monday morning. However, an extension was requested by the employee that the car be delivered by no later than 17h00. The car, however, was only returned later in the evening around 21:30, on the same date – after the permanent staff of the service provider had already left and the person who had remained was the security officer, Vincent Chauke (Mr Chauke). He further interacted with both Mr Chauke and Ms Chantelle, whereby the former confirmed that when the car was returned it had been resprayed.[6] He was convinced that there was a case that the employee had to answer. Consequently, the employee was issued with a notice to attend a disciplinary hearing, as set out above in paragraph 4.

[10] The employer's second witness, Ms Chantelle, was employed as a sales supervisor of the service provider, whose evidence can be summarised thus.

[4] Records: page 35.

[5] Records: page 50.

[6] Records: page 140.

She explained the process of a car that has been rented out and what is required when it is returned. She is a supervisor in the area of damages, administration errors, and so forth.[7] Moreover, when one returns a motor vehicle after hours, a security officer will inspect it, and then if there is something not right with it, it will be brought to the attention of an official of the service provider the next morning, in order to address the issue.[8] In the matter in casu, Ms Chantelle was directly involved, and she explained that she learned through one Mshazo that the employee returned the car, re-sprayed.

[11] She then proceeded to inspect the vehicle and explained that— *"you could see it was re-sprayed, because it was such a bad spray job".*[9] She further explained that the damages were on the bonnet and front bumper. When the question was posed to her as to how could she identify that the car was damaged; she explained that according to her experience, it had *inter alia* blotches, and *"the paint was running, so the bonnet was not smooth it had likely keep things on it"* and " *the paint actually came off on my hands"*.[10]

[12] According to her, attempts were made to contact the employee, on the cell phone number provided. However, there was no answer. She then left a voice message advising the employee in respect of the car's condition.[11] After that, on the same date, she proceeded to transmit an email to one Michelle Van Antwerp of the employer, copying the branch manager of the service provider. When she was asked as to whether it was possible that, after the dropping of the car by the employee, someone might have driven the car between 21h30 and 08h00 the following morning before her assessment of same, she said it was improbable considering that the car had not even been taken to the filling station.[12]

[7] Records:page 166.

[8] Records:page 170-173.

[9] Records: page 203.

[10] Records: page 176; 204.

[11] Records:page 177.

[12] Records:page 192.

[13] She further explained that in case a rented vehicle is involved in an accident, there is a procedure that has to be followed, e.g., a driver should not repair the vehicle, but notify the service provider about the accident.[13]

[14] The employer also led evidence of Andre Nell Malgue (Mr Malgue), a motor assessor who qualified as a panel beater in 1971 testified as follows: he examined the car on 6 October 2014, who confirmed that there were repairs to the car which were not properly done as he had to put in a new bonnet.

[15] After all the above evidence not being disputed, the employer presented evidence of Mr Chauke, who confirmed that the car was returned after hours by the employee and he did check the car as per the procedure of the service provider. The bone of contention was whether or not, at the time the car was returned, had been damaged and resprayed. Further, the evidence of this witness was that he realised that there was respraying to the car that had been done.

[16] There were some minor inconsistances in respect of his version, such as when did he notice that it had been resprayed, and the information in the occurrence book. Moreover, what is important about this witness is what happened on the morning of 23 September 2014, about 10 hours after the car had been returned to the service provider. The question remained as to when was the car damaged and resprayed. If, it was resprayed after being returned by the employee that would mean Mr Chauke drove the car at midnight, damaged it and thereafter managed to get a panel beater to respray it, by 7am on 23 September 2014.

[17] The employee proceeded to present his case as follows, in respect of charge 2: he confirmed that he was in control of the car between 17 and 22 September 2014. He delivered it to Mr Chauke on behalf of the service provider, who inspected it and advised him that “everything was well”, and denied that the car was damaged at the time he returned it.

[13] Records: page 193.

[18] The arbitrator, in respect of the finding in charge 2, acknowledged that there were some inconsistencies in the evidence of Mr Chauke, specifically as to when he inspected the vehicle, and as to what was discussed with the employee.[14] Moreover, on this basis, the arbitrator rejected the evidence of the employee and concluded that indeed he had failed to comply with what was required of him, reporting the accident to both the employer and the service provider.

Grounds for this review application

[19] The applicants' grounds of review can be summarised thus: that the arbitrator misdirected himself regarding the evidence of Mr Chauke and according to them the alleged misdirection *"distorted the outcome of the arbitration to such an extent that the results of the award is unreasonable and thus reviewable"*, and that taking his evidence "*in the context of all the evidence before the Commissioner, is the only evidence that directly implicates [him] in the alleged infliction of damage to the hired vehicle, albeit only circumstantially*".

[20] The applicants, further say that Mr Chauke's concession that he had incorrectly recorded the date of the inspection has an adverse effect on the assessment of the liability for the damages to the car to both the service provider and employer.

[21] They further allege that—

> "As mentioned, absent Chauke's evidence, it is respectfully submitted that there is no evidence against me as regards charge (2). There is similarly devastating impact if chauke's evidence were to hold less weight in the overall assessment of the matter. Accordingly, the distorting effect of the commissioners misdirection-namely the unwavering reliance on Chauke's evidence - is such that it changes the outcome of the dispute and led the Commissioner to an unreasonable result."

Applicable principles and application thereof

[14] Pleadings: paras 4.8 to 4.10.

[22] In *NUMSA and Another v SAMANCOR Ltd (Tubatse Ferrochrome) and Others*, the SCA,[15] cautioned that—

> ". . . an appeal does not lie against the award of an arbitrator. Even if the reviewing court believes the award to be wrong, there are limited grounds upon which it is entitled to interfere."[16]

[23] In the matter of *CUSA v Tao Ying Metal Industries & Others*,[17] the Constitutional Court held that an arbitrator, in order to perform his duties effectively, is given a measure of latitude in deciding a matter before him in a manner that he deems fit. However, what needs to guide him is that he needs to deal with the real dispute between the parties expeditiously and act fairly to all parties in accordance with the Labour Relations Act.[18] In so doing, he should disregard claims and counterclaims which would not assist, in order to reach a reasonable decision. Moreover, the arbitrator is required to reach the desired outcome based on the evidence that was properly placed before him.

[24] Once an arbitrator has issued an arbitration award, a party who is not satisfied with such an award has a right to approach this Court by way of review application and has to present grounds which justify for that arbitration award to be reviewed and set aside. Thereafter, the presiding officer faced with a review application, has to answer the following questions as set out by the Judge President, in *Goldfields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v CCMA and Others*[19] in order to determine such review:

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[15] [2011] 11 BLLR 1041 (SCA); (2011) 32 ILJ 1618 (SCA).

[16] Id at para 5. Further in *Herholdt* the Court held at para 25:

> "A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[17] Above n 2.

[18] Id. 66 of 1995, as amended.

[19] [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20. (*Goldfields*)

"(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, **did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute**?

(ii) Did the arbitrator **identify** the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)?

(iii) Did the arbitrator **understand** the nature of the dispute he or she was required to arbitrate?

(iv) Did he or she deal with **the substantial merits** of the dispute? and

(v) Is the arbitrator's decision one that **another decision-maker reasonably have arrived** at based on **the evidence.**" (Emphasis added.) (I will refer these as six pillar requirements)

[25] In the same *Goldfields* matter, the Court in expounding the test as per *Sidumo*,[20] indicated that in a review application there is a two stage enquiry that has to be established, for a party to succeed in the review application. The first question that has to be answered is whether there is any gross irregularity on the part of the arbitrator that is being alleged by an applicant? If the answer to this question is yes, then it has to be established that such irregularity prevented an applicant to have a fair trial of the issues for it to amount to unreasonableness.

[26] My understanding of the applicants' grounds of review, is that they do not, dispute the fact that the arbitrator did give them a full opportunity to have their say in respect of the dispute which was before him (pillar requirement 1); they further do not dispute that the Commissioner did identify the dispute before him (pillar requirement 2); and that he understood the nature of the dispute before him (pillar requirement 3). However, it appears that the applicants are saying that the arbitrator did not deal with the substantial merits of the dispute, taking into account the evidence before him, and therefore his decision is one that a reasonable decision-maker could not have made (pillar requirements 4, 5, and 6).

[20] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110.

[27] In order to answer the three remaining pillar requirements, one has to take into account the standard of proof that the arbitrator was required to observe and to use, based on the totality of evidence that was before him. The evaluation of proof applicable is one that applies in civil matters, not in criminal cases. In the matter of *Govan v Skidmore*,[21] then Natal Division held that—

> "Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt. In a criminal case, however, as I understand it, every fact material to establish the guilt of the accused must, unless it is admitted, be established by proof beyond reasonable doubt, and inferences from facts must, in order to be permissible, be such as leave no reasonable doubt of their propriety and correctness. That is a difference between the proof requisite in civil and criminal proceedings. *Rex v. Blom*, supra, was a criminal case, and, in my opinion, it is a fallacy to suppose that the second principle in *Blom*'s case represents the minimum degree of proof required in a civil case, for, in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence (3rd ed., para. 32), ***by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one***." (Emphasis added.)

[28] Taking into account this *dictum*, one has to look at the evidence that was before the arbitrator and his analysis of the matter as found in the arbitration award, and check as to whether the conclusion that he reached is one that a resonable decision maker could have made. To decide, on these three pillar requirements, one has to look at what was the dispute between the parties; the answer is simple in that it was not in dispute that the car was damaged and re-sprayed. However, the question is who damaged and then resprayed the car. Is it possible that it was Mr Chauke? And if the answer is that it might have been him, another question that will arise is when and under what circumstances – taking into account that the car – according to the evidence of Ms Chantelle had not even been taken to the filling station when she

[21] 1952 (1) SA 732 (N) at 734.

assessed it on the morning of 23 September 2014. Again, if one is inclined to think that it was Mr Chauke, the question is: at what stage did he do it? The answer to this question is that it is improbable, that Mr Chauke used the car, damaged it and got it resprayed the same night.

[29] The most plausible, natural inference to be drawn based on the totality of evidence that had been properly presented before the arbitrator is that the employee damaged the car, fixed it and took it to the service provider at night hoping that they were not going to be aware that it was involved in an accident. The basis for this, includes among other things, that the employee was supposed to return the car earlier that date, however, he phoned to say he was going to deliver it at a later stage, by 17h00. He ended up delivering the car at 21h30. Further, the employee had a burden to present evidence as to what could have happened to the car motor vehicle. For example, as to whether it was already damaged and "resprayed" when he took it from the service provider. I need to emphasise, that I am not saying the employee had the onus of proof but a burden to adduce evidence.[22] Also taking into account that the car was not used between 21h30 and 08h00 when it was assessed by.

[30] The arbitrator's conclusion, was that: the version of the employee is that they inspected the car together with Mr Chauke and he indicated that everything was in order. This was never put to Mr Chauke during cross-examination, and therefore Mr Chauke's version was accepted. He further concludes that taking into account the probabilities it was clear that the employee concealed the damages to the car which is a sign of being dishonest.

[31] I have taken into account, the grounds of review that the employee relies on. I am of the view that when the employee approached this Court, he meant to appeal the decision of the arbitrator and or wanted the arbitrator to apply the test which is applicable in a criminal matter, which is one of beyond

[22] *DB Contracting North CC v National Union of Mineworkers & Others* [2015] 10 BLLR 973 (LAC); (2015) 36 ILJ 2773 (LAC) at para 75.

reasonable doubt. I say this because, in paragraph 7.4 of the founding affidavit, the applicants suggest that as the date and time of the inspection as per the occurrence book were not clear, the liability for the damages incurred by both the service provider and employer could have been different. I disagree with this submission taking into account the totality of evidence that was before the arbitrator. In casu, facts that the arbitrator did not specifically deal with in the award, under analysis, do not mean that he did not apply his mind to them, taking into account the arbitration award in totality. I therefore conclude that the arbitrator's award ticks all the boxes of the six pillar requirements. Under these circumstances, the review application fails.

Order

[32] Based on the above, the following order is made:

1. The review application is dismissed.
2. The First Applicant to pay the costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Makhura

Instructed by: Cheadle Thompson Haysom Inc.

For the Respondent: Mr Orr

Instructed by: Bowman Gilfillan Inc.