**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Case No JA 10/2010

In the matter between:

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| **SOUTH AFRICAN BREWERIES LIMITED** | **Appellant** |
| **(Amalgamated Beverage Industries Limited,** | |
| **Soft Drink Division)** | |
| and | |
| **RETAIL AND ALLIED WORKERS UNION** | **First Respondent** |
| **ELLINGTON MVUMA** | **Second Respondent** |
| **COMMISSOPNER FOR RECONCILIATION,** | |
| **MEDIATION AND ARBITRATION** | **Third Respondent** |
| **COMMISSIONER THULANI DUBE N.O** | **Fourth Respondent** |

**Heard:** **29 May 2013**

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**JUDGMENT**

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JAPPIE, JA

[1] I have read the judgment of Molemela AJA and I do not agree with her conclusion.

[2] The learned Judge came to the conclusion;

> 'I am satisfied that the fourth respondent's credibility findings were justified. In my view, the court *a quo* correctly found that the fourth respondent's decision was one that a reasonable decision-maker could reach. It also correctly dismissed the application for review. I would accordingly dismiss the appeal with costs.'

[3] Molemela AJA correctly concluded that the outcome of the appeal is dependent on a finding in regard to credibility. The issue of credibility has been identified correctly by the second respondent in paragraph 23 of the second respondent's heads of argument where the following submission is contained:

> 'It is submitted that in coming to his conclusion, the Commissioner was faced with two versions hereto and had to accept one over the other. Therefore, Mvuma's version was accepted as most probable on the basis of evidence and facts before the Commissioner as evident from the award and on the record. It is further submitted that this finding was based on finding of credibility in favour of (the) Mvuma against the Applicant's witnesses. Having due regard to the record, evidence led, and considerations given to the evidence and weighing up same, the conclusion derived at was reasonable based on logical reasoning as can be gleaned from the award.'

[4] The chronology of the events giving rise to the appeal is set out succinctly in paragraph 3 to 9 of Molemela AJA's judgment and there is no need for repetition.

[5] The second respondent was dismissed from his employment by the appellant for dishonesty in that 'on the 24th January 2003- 49 cases of 340ml cans were found in the vehicle without documentation.' It is common cause that when the delivery vehicle driven by the second respondent was stopped it had on it 49 cases of 340ml cans which could not be accounted for on the delivery vehicle. It is this fact which gave rise to the second respondent being disciplined and dismissed from his employment.

[6] There are two versions as to how the 49 cases came to be loaded on the delivery vehicle. The appellant's version as testified to by Zelda Goosen who was

supported by Rezelle Van Der Westhuizen, Dawid Dippennar and Magdalena Haywood is as follows;

> 'On the 23rd January 2003, the second respondent approached Goosen with a proposal that they i.e. (Goosen and the second respondent) should collaborate in stealing stock (soft drinks) from the depot. This resulted in a meeting between Dippenaar, Haywood and Goosen during which it was agreed that Goosen would be given indemnity and that she should play along with the second respondent.'

[7] On the 27th January 2003, Goosen reverted to the second respondent and informed him that she was prepared to go along with him. The second respondent was required as a driver to deliver goods to customers. It was in this context that Van Der Westhuizen gave the second respond a load order sheet on the understanding that the load would be prepared and thereupon be delivered by the second respondent. The order was duly loaded on a truck. Upon completing the loading the load sheet was signed by Goosen and as the truck, driven by the second respondent was leaving the depot, it was stopped by Haywood after apparently being tipped off by Goosen who confronted the second respondent. The truck was searched and it was found that it contained 90 cases of soft drinks of which 49 cases were in excess of the order. The second respondent was then suspended and charged with misconduct.

[8] The second respondent's account as to how extra stock came to be found on the back of the delivery truck was not articulated by him at the arbitration but rather appears in the course of Goosen's cross-examination by the second respondent's representative and what was put to her reads as follows:

> 'MR KHOSA: the question is, at the time when the applicant went to collect the invoices at the office, he was informed that you have the invoices, and when he came to you he found you busy checking the truck.[Y]ou are the one who informed the applicant that the truck was short of stuff and you [had] already requested the warehouse to bring those items, and in indeed the forklift came., Those items were loaded in front of you, and you signed that everything was okay'.

The contention of the second respondent is that Goosen had framed him by loading 49 additional cases of soft drinks into the truck without his knowledge.

[9] When the fourth respondent (the Arbitrator) had to assess the two versions and in doing so he came to the following conclusion;

> 'I find no sufficient evidence to prove that the applicant had made proposition to defraud the respondent. The respondent's witnesses Mr Dippenaar and Ms Haywood fell short to prove that the applicant on 24 January 2003 **had intentionally left the respondent's premises with extra stock...**
>
> In this matter there was insufficient evidence placed at the arbitration hearing that the applicant had the intention to defraud the respondent and had intentionally loaded the vehicle with extra stock. **There was insufficient evidence proving that he had taken part in the loading of the vehicle.'** (My emphasis).

[10] In the Labour Court, one of the grounds upon which the appellant sought to review and set aside the fourth respondent's award was that the fourth respondent had failed to apply his mind to the material facts which constituted both gross irregularity and an act of unreasonableness.

[11] The Labour Court dismissed the review having come to the conclusion that:

> 'In view of the fact that the fourth respondent was charged with the responsibility to determine the fairness of the dismissal, it would be improper for the reviewing court to find then that where he had find that there was **insufficient evidence**, it should upset that finding simply because the aggrieved party, the applicant in this regard, has a different interpretation of the evidence that was before the Arbitrator.'

[12] In my view, the fundamental error made both by the fourth respondent and the Labour Court is the failure to have regard to the minutes of the disciplinary enquiry. At the disciplinary enquiry, held on 6 February 2003, the second respondent gave the following account as to how the delivery truck was loaded:

> 'I checked at the point and this load report was with Zelda [Goosen]. I gave her the hand written order and went out to pack my load. When I was done Zelda checked my load and said I was short of 50 cases. I enquired which flavour was short and she said Coke. As Rezell [Van Der Westhuizen] has said I must hurry, I grabbed the 50 cases [of] coke and loaded these onto the truck. We signed and I was ready to leave.'

[13] It is clear from this account, which is the second respondent's first account as to how the extra 49 cases were loaded in the truck that there is no suggestion that Goosen had done so without his knowledge. In fact he stated that he had loaded the 50 cases. If this is indeed so there can be no suggestion that Goosen had arranged for the loading of the 50 cases without his knowledge in order to frame him.

[14] Moreover, there is the additional evidence given by Kenneth Tshabebi at the disciplinary enquiry. His testimony is as follows:

> '[Mvuma]: Do you still remember what happened on 24 January 2003?
>
> [Tshabedi]: Yes.
>
> [Mvuma]: Who made the order for us?
>
> [Tshabedi]: The two of us.
>
> [Mvuma]: What type of paper were we using?
>
> [Tshabedi]: One paper-1 full scrap (A4).
>
> [Mvuma]: When loading the truck, who was with us?
>
> [Tshabedi]: A white lady.
>
> [Mvuma]: How did we get the extra 50 cases?
>
> [Tshabedi]: We loaded 3 pallets, everything was there
>
> [Mvuma]: Who instructed us to get the 50 cases?

[Tshabedi]: There was no extra 50 cases, everything was there.'

It is apparent from the Tshabedi evidence that Goosen had nothing to do with the order that was loaded, that she had instructed extra 50 cases to be loaded and that she had arranged for such to be loaded.

[15] It is common cause that the aforesaid material was placed before the fourth respondent and indeed was available for the Labour Court. It is further apparent from the award and from the judgment of the Labour Court that the aforesaid material had not been taken into account. In my view, if the fourth respondent had applied his mind to the aforesaid material, he could not reasonably have concluded that 'there was insufficient evidence proving that he (the second respondent) had taken part in the loading of the vehicle.'

[16] Moreover, by failing to take into account as to what had occurred at the disciplinary enquiry the assessment of the fourth respondent as to the credibility of the second respondent is therefore unreasonable. If the first version given by the second respondent at the disciplinary hearing that Goosen was not involved at all in the loading of the truck and supported to that extent by the evidence of Tshabedi then, in my view, the second respondent's claim that he had been framed by Goosen is not credible. The only credible version as to what occurred on 24 January 2003, is that the second respondent had loaded 49 extra cases into the delivery truck without having the necessary documentation and consequently ought to have perpetrated an act of dishonesty. In my view, the fourth respondent ought to have confirmed the dismissal of the second respondent as being both procedurally and substantively fair. Consequently, the Labour Court had erred by not allowing the review.

[17] In the result, I make the following order:

1) That the appeal be upheld.

2) That the order of the Labour Court is set aside and is replaced with an order as follows;

a) The review succeeds and the decision of the fourth respondent is set aside and replaced with an award which reads as follows:

i. The dismissal of the second respondent is found to be both procedurally and substantively fair.

ii. There is no order as to costs.

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Jappie JA

I agree

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Waglay DJP

MOLEMELA AJA

[18] This is an appeal against the whole judgment of the labour court in terms of which the appellant's application for review was dismissed with costs. The review application was directed at the fourth respondent's award in terms of which he found that the second respondent's dismissal was substantively unfair and

ordered his re-instatement. The court *a quo'*s dismissal of the review was on the basis that the fourth respondent's award was one that a reasonable decision-maker could reach and thus did not warrant to be set aside.

[19] Before dealing with the merits of the appeal, I wish to comment on the state of the record that was placed before this Court for purposes of the appeal. Page 29 – 44 of the record is replete with what the transcription services company has termed "inaudibles", i.e. inaudible parts of the recording. Rule 5(7) of the Rules regulating the conduct of proceedings of the Labour Appeal Court provides that the appellant shall file a copy of the record with the registrar of the court. It has been held in a plethora of cases that the record filed by the appellant must be in order. Where an appellant is represented, the responsibility to place a proper record before the court rests with the appellant's attorney of record. It is expected of the attorney to peruse the record and satisfy himself that it is complete. Given the state of the record filed in this matter, I can only infer that the appellant's attorneys did not peruse it before filing it. When the appellant's counsel was questioned about the state of the record at the hearing of the appeal, no satisfactory explanation was advanced, save to mention that only a few pages were in that state. For my part, reading a record in this state was quite an onerous task. Be that as it may, I will leave it at that.

[20] I now turn to deal with the merits of the appeal. At the disciplinary hearing constituted by the appellant, the second respondent was charged with: 'dishonesty in the course of employment in that on the 24th January 2003, 49 cases of 340ml cans were found in the vehicle without documentation.'

[21] The appellant's key witness was one Goosen, a security guard and site manager in the employ of Fidelity Guards Security Company but posted at the appellant's depot premises. In a nutshell, Goosen's evidence was that on 23 January 2003, the second respondent approached her and proposed that she collaborates with him in stealing stock (soft drinks) from the appellant's depot, after which the two of them would equally share the proceeds of the stolen stock. Goosen reported

the second respondent's proposition to her immediate supervisor, *viz* Haywood, who in turn reported same to the appellant's depot manager, *viz* Dippenaar.

[22] According to Goosen, a meeting was held, which was attended by herself, Haywood and Dippenaar. This meeting resolved that a trap should be set for the second respondent, with Goosen being promised indemnity from disciplinary steps in return for playing along in the entrapment. She agreed to partake. She reverted to the second respondent the next day and accepted his proposal on the understanding that he would let her 'know when, what, where' with regards to execution of the plan.

[23] Goosen's version regarding the second respondent's proposition was corroborated by Haywood and Dippenaar. According to Goosen, in terms of the appellant's rules, the driver of the delivery truck and the "checker" (security guard checking the stock) were jointly responsible for ensuring the accuracy of the amount of stock loaded on the delivery truck. She was the "checker" on that day. She checked the stock with the second respondent and knew that there was extra stock on the truck but since she was playing along she did not query this excess and perfunctorily perused the delivery documents. The second respondent drove the truck out of the loading area. As he was trying to drive out of the depot, the truck was stopped by Haywood. It is common cause that a subsequent search of the truck revealed that it had 90 cases of soft drinks, this being 49 cases in excess of the order.

[24] In his version, the second respondent vehemently denied the alleged proposition and the existence of any collaboration to defraud the appellant as asserted by Goosen. According to him, he barely knew Goosen and could in any event not have made any proposition to her on 23 January 2003, as he was away from the depot doing merchandising duties on that day. He denied that he was unwilling to stop the truck when Haywood signalled to him to stop. He testified that as he was employed as a merchandiser and not a driver, he was not *au fait* with company procedures governing the loading of the delivery truck and accordingly did not

take any responsibility for the accuracy of the stock that was on the truck. According to him, Goosen was the one that checked the load *vis-à-vis* the order-sheet or invoices and was the one who gave him the go-ahead to leave the depot with the load on the truck.

[25] Under cross-examination, it was asserted that the second respondent could not have made the proposition because: (a) he was not driving the delivery truck on 23 January 2003 (the day the proposition was allegedly made) and thus it was not possible to steal anything on that day; (b) he was away from the depot merchandising at the time; (c) he did not know Goosen well; (d) he had not known that he would be doing deliveries the day after the proposition and it was therefore unlikely that he would have made the proposition; and (e) if there had been a plot to steal, this would have occurred during the first delivery he made on 24 January 2003.

[26] It is common cause that although the second respondent was employed as a merchandiser, he would, from time to time, carry out the functions of a driver by delivering stock to the appellant's customers whenever so instructed by the appellant. It was not disputed that the second respondent did not receive any training pertaining to the loading and checking of stock intended for delivery. It is also common cause that on 24 January 2003, the appellant was instructed by his line manager to assist with driving the company delivery truck as the sales department was short of a driver. He successfully completed the first delivery and returned to the workplace. He was subsequently instructed to do a further delivery and was provided with an order sheet on the understanding that the load would be prepared and then be delivered by the second respondent.

[27] In his award, the fourth respondent, having referred to the fact that the company had the *onus* of proof, held as follows:

> 'In this matter there was insufficient evidence placed at the arbitration hearing that [Mvuma] had the intention to defraud the [company] and intentionally loaded the vehicle with extra stock. There was insufficient evidence proving that he had

> taken part in the loading of the vehicle. I find that the [company] has failed to discharge the burden of proof. I therefore find that the dismissal was substantively unfair." … "I find no sufficient evidence to prove that [Mvuma] had made [a] proposition to defraud the [company]. The [company's] witnesses... Dippenaar and... Haywood fell short of proving that [the second respondent] on 24 January 2003 had intentionally left the [company's] premises with extra stock.'

The fourth respondent also found that Goosen's evidence was 'unclear, unreliable and quite unbelievable'.

[28] In dismissing the review application, the court *a quo* *inter alia* found that:

> '…The finding of the [commissioner] that the [company] failed to discharge the burden of proof cannot be faulted. ...It is clear that the case of the [company] was strongly based on what Goosen had to say. It was therefore important for the [commissioner] in determining the alleged dishonesty to consider the evidence of Goosen and where necessary be critical of it as he did. Before making a conclusion that her evidence was unclear, unreliable and quite unbelievable, the [commissioner] made reference to certain portions of her evidence which the [commissioner] found make her evidence quite unclear and unreliable. I cannot fault that finding.'

[29] It was argued on behalf of the appellant that the fourth respondent's award was not a conclusion that a reasonable decision-maker could have made given the evidence that was before him. It was argued that he rejected Goosen's evidence based on an erroneous finding that she had not communicated her willingness to collaborate in the theft to the second respondent. It was also argued that such a rejection of her version was made without due regard being paid to the probabilities.

[30] Having considered the entire record and the evidence put before the fourth respondent, I am not persuaded that he committed any irregularity that vitiates his finding. For the reasons set out hereunder, I agree that Goosen's evidence was unclear, unreliable and incredible. The version that she presented at the

disciplinary hearing was sketchy with regards to the second respondent's proposition. While the version that she presented at the arbitration hearing had more detail, the detail of Goosen's communication of her agreement to the proposal only emerged during cross-examination.

[31] What is clear from her evidence is that she was not present when the truck driven by the second respondent was loaded with stock on 24 January 2003. According to her testimony, whenever the warehouse receives an order sheet, the order-makers 'make up the order, then the forklift drivers bring it to the truck and then the driver checks with them if everything is in order and they load it onto the truck. Then the checker comes in…checks with the driver…' Being conversant with company procedures and having agreed to be part of the appellant's plot to trap the second respondent, she did not witness the loading process. According to her, when she arrived at the truck, the loading was already complete. She did not know who was responsible for the loading of the delivery truck on that day.

[32] None of the appellant's witnesses testified about what happened during the process of loading the delivery truck on that day. For his part, the second respondent testified that he was not continuously present during the loading process, as he at some point had to collect the computer-generated invoice from the office. That he was paged to the office to collect the computer-generated invoice was corroborated by one of the appellant's senior sales employees, Lezelle van der Westhuizen.

[33] Significantly, Goosen admitted under cross-examination that there were instances, previously, when the stock brought from the warehouse by the forklift drivers did not tally with the stock on the order-sheet, i.e. when it was either deficient, or in excess. Significantly, too, there is no evidence that the second respondent signed any documentation acknowledging the amount of stock that was loaded on the truck. This is evident from the record of the evidence adduced

at the disciplinary enquiry, where the second respondent was asked why he had not signed the loading sheet.

[34] The second respondent's evidence that someone else (Kenneth) assisted him with the loading was corroborated by Kenneth. The appellant's contention that the fact that the truck was loaded at the loading bay and not at the checkpoint cast suspicion on the second respondent was refuted by Buthelezi, who corroborated the second respondent's evidence that he (second respondent) had previously loaded the delivery truck at the same spot without any censure. In my view, there is clearly a missing link in the evidence adduced by the appellant. I am therefore inclined to agree with the fourth respondent that there was insufficient evidence placed before him to prove the second respondent's dishonesty and thus to sustain the charge.

[35] It was argued on behalf of the appellant that Goosen's version was borne out by the common cause fact that she reported the second respondent's proposition to both Haywood and Dippenaar and that, given the fact that there was no bad blood between Goosen and the second respondent, she had no reason to lie about the proposition and to place her job in jeopardy by making a false report to Haywood and Dippenaar. When questioned as to why Goosen would lie about him, the second respondent contended that Goosen framed him in an attempt to answer criticism by the company that Fidelity Guards had not been performing adequately. Pressed further, the second respondent contended that other persons had been involved in a plan to get him out of their way. He ended up speculating that perhaps Goosen wanted to stamp her authority and to show that she was doing her job.

[36] The reason advanced by the second respondent is, in my view, not inconceivable, given that Dippenaar testified that he had on numerous occasions called staff meetings where he highlighted the shrinkage problem that the company was experiencing. Although the appellant made heavy weather out of the second respondent's responses under cross-examination on this aspect, I

find nothing sinister about them. In *S v Ipeleng,*[1] Mahomed, J stated as follows: 'It is dangerous to convict an accused purely on the basis that he cannot advance any reasons why the state witnesses would falsely implicate him. The accused has no *onus* to provide such explanation. The true reason why a state witness seeks to give the testimony he does, is often unknown to the accused and sometimes unknowable.' In my view, the second respondent's inability to furnish what the appellant could consider a plausible explanation for being falsely implicated plays no role on the probabilities of this matter.

[37] In my view, it is not fair for the appellant to contend that the fourth respondent wrote off the entire evidence of Goosen on the basis of two contradictions. The fourth respondent correctly criticised the lack of detail in the evidence Goosen presented at the disciplinary hearing. This omission was indeed curious. There seems not to be a stage when Goosen and the second respondent agreed that they were going to execute the plan. The fourth respondent aptly asked the question:

> 'After his proposition (inaudible) think about it did you go back to (inaudible) to talk about (inaudible)?

The response was as follows:

> 'No, (inaudible) after I've discussed it with Mr Dave Dippenaar, we saw each other, it was in the morning, we saw each other and I said ok, **but he must actually let me know when, what, where'** (my emphasis).

Goosen further testified that she wanted the second respondent to tell her when he was ready to execute the plan. What is strange is that despite the fact that she had told him that she would await the detail of the execution of the plan from him, he allegedly went ahead without engaging her any further. I find it highly unlikely that the second respondent would simply proceed with the execution of

[1] 1993 (2) SACR 185 (T) at 189C-D.

their plan without 'the when, what and where' being discussed with his collaborator beforehand.

[38] What makes Goosen's version about the proposition more improbable is the fact that after Goosen's alleged agreement to co-operate, the second respondent went on to deliver the first load without taking any extra stock. Considering that he was not a regular driver, the likelihood is that if he had initiated the scheme to defraud the appellant, he would have jumped at the first available opportunity to do so. The court *a quo* correctly found that before making a conclusion that Goosen's evidence was unclear, unreliable and quite unbelievable, the fourth respondent made reference to certain portions of her evidence which justified that finding.

[39] I agree with the appellant's counsel's submission that where factual disputes have arisen, a commissioner is obliged to resolve them by undertaking a balanced assessment of the credibility, reliability and probabilities associated with mutually exclusive versions. He will misdirect himself if he fails to do so. In his award, the fourth *inter alia* stated as follows: '…The respondent alleges that the applicant had hatched a plot to defraud the respondent in collusion with Ms Goosen. She admitted that she had no relationship and had very limited interaction with the applicant in the past. It is significant to me whether or not she informed the applicant of being part of the plot. It seems to me that the response that she had told the applicant that "it was okay to make a plan" was an afterthought.' This part of the fourth respondent's evaluation of Goosen's evidence is undoubtedly an assessment of the probabilities.

[40] It is clear from the record that the fourth respondent also opined that Goosen could not satisfactorily explain why she did not report the second respondent's alleged offer to pay her an amount of R10 000.00 as a bribe to the police or authorities. Even though the fourth respondent erroneously stated that the criminal case preceded the disciplinary hearing, which was factually incorrect, it is a fact that the attempted bribery was never reported to the police. This is

another part of the evaluation of evidence that is directed at the assessment of the probabilities. The appellant's contention that the fourth respondent in his assessment of the evidence confined himself only to the assessment of the witnesses' credibility is clearly without any foundation.

[41] One of the criticisms against the fourth respondent's evaluation of evidence in his award is that he did not pronounce himself on the probabilities of the second respondent's version. Having demonstrated in the aforegoing paragraphs that he did assess the probabilities of Goosen's evidence, which constituted the crux of the appellant's case, I am of the view that the evaluation of the second respondent's evidence is implicit in the fourth respondent's evaluation of the appellant's version, as the fourth respondent would have had to juxtapose it against the competing or opposing version. The second respondent's version bore no inherent improbabilities. Its only shortcoming is a single contradiction between his evidence at the disciplinary hearing and the evidence adduced at the arbitration hearing pertaining to an averment that the extra stock landed on the delivery truck at Goosen's instance.

[42] The fact that the second respondent contradicted an aspect of his earlier version does not, in itself, warrant a rejection of his entire version. See *S V Oosthuizen* 1982 (3) SA 571 (T) at 516A. This is more so because the second respondent was not, during his cross-examination, confronted with this contradiction so that he could explain it. See *S V Mafaladiso* 2003 (1) SACR 583 (SCA) at 593J – 594F. In my view, the version of the second respondent was, notwithstanding this contradiction, more probable than that of the appellant and its shortcoming in no way made up for the missing link in the appellant's version.

[43] While there is no doubt that the fourth respondent's evaluation of evidence was brief, I am satisfied that it complies with the guidelines stipulated in the case of *SFW GROUP LTD V Martell Et Cie and Others* 2003 (1) SA 11 in that it assesses credibility, reliability and probabilities.

[44] In conclusion, I am satisfied that the fourth respondent's credibility findings were justified. In my view, the court *a quo* correctly found that the fourth respondent's decision was one that a reasonable decision-maker could reach. It also correctly dismissed the application for review. I would accordingly dismiss the appeal with costs.

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Molemela A J A

APPEARANCES:

FOR THE APPELLANT: Adv. A.T. Myburgh

Instructed by Farrell & Associates

FOR THE RESPONDENTS: Mr Khoza

Retail and Allied Workers Union