In the Labour Court of South Africa
Held in Johannesburg

Case number: JR 412/04

In the matter between

Masstores (Pty) Ltd t / a Builders Warehouse	Applicant

and

CCMA	First Respondent
Steve Dawson N.O	Second Respondent
Arnoldus M. van der Merwe	Third Respondent

Judgment

Cele AJ

Introduction

[1] This is an application in terms of section 145 of the Labour relations Act 66 of 1995 to review and set aside an arbitration award dated 23 January 2004 issued by the second respondent while he was acting under the auspices of the first respondent. The second respondent found the dismissal of the third respondent to have been unfair and ordered the applicant to reinstate and pay to

him a compensatory emolument.

Background Facts

[2] The third respondent commenced employment with the applicant on 1 May 2002, as a Land manager. He earned between R 10 000 to R 22 000 per month.

[3] The applicant conducted the business of retail and wholesale in building industry. When purchasing goods from the applicant, the general procedure was that buyers were required to have an original cash slip in their possession before they could remove goods from applicants premise.

[4] In terms of applicant's disciplinary code, being under the influence of alcohol was considered to be a very serious offence which warranted dismissal as a sanction.

[5] In January 2003 the third respondent was served with a notice to attend an internal disciplinary enquiry. On 9 January 2003 the enquiry commenced with one Dr J.J Moller as chairperson, Mr Jacques Perie was the complainant and the third respondents appear unrepresented. He was facing charges:

1. Under the influence of alcohol whilst driving a company vehicle and working under said influence during working hours
2. Gross negligence and / or disregard of work rules and

regulations and / or gross misconduct resulting in potential and / or actual loss to the company.
3. Serious deviation from company policy.
4. Violation of safety rules.
5. Behaviour that caused a disruption in the work / production process.

[6] The third respondent pleaded not guilty to the charges. He was acquitted of the first two but was found to have committed the last three. Various sanctions were imposed thus:

In the third – Counselling or training;

In the fourth – Dismissal, if he could present an original valid invoice the charge would be withdrawn and sanction removed from the outcome.

In the fifth – Part i – Final written warning
Part ii – Dismissal, alternatively demotion and transfer.

[7] On 4 February 2003 the third respondent lodged an appeal. On 18 February 2003 the outcome of disciplinary hearing and the sanction, were confirmed by one Mr Hermse who chaired the appeal hearing. The third respondent was accordingly dismissed, on 18 February 2003. He was aggrieved and a dismissal dispute arose between him and applicant.

[8] On 10 April 2003 the third respondent referred the dismissal dispute to the first respondent for conciliation. He was granted condonation for the late referral of the dispute and a certificate of outcome was issued on 14 August 2003. As the dispute could not

be resolved. The third respondent referred the dismissal dispute for arbitration.

[9] On 19 January 2004 the arbitration proceedings commenced with the second respondent as the arbitrator. One Mr Duvenhage of MNU solidarity represented the applicant.

[10] Before the mechanical recording started, the second respondent endeavoured, in conjunction with the parties, to resolve the matter. There are facts of the matter in relation to which an agreement was reached that they were common cause. In the main, such facts form part of the background facts herein.

[11] The matter was referred to arbitration for the determination of both substantive and procedural fairness of the dismissal. The dismissal was not in dispute. Mr Duvenhage then withdraw the procedural unfairness ground of the dismissal. The applicant was then called upon to prove that the dismissal of the third respondent was substantively fair.

[12] The applicant called two witnesses, Mr Hermse who was the chairman in the internal appeal hearing and one Mr Dlamini. In respect of each of the witnesses of the applicant, the second respondent indicated that their evidence was irrelevant. That of Mr Harmse, he ruled to be irrelevant as the procedural ground of dismissal was withdrawn by the third respondent at the beginning of arbitration proceedings. He ruled the evidence of Mr Dlamini to be inadmissible and said Mr Dlamini did not work with the third respondent nor was Dlamini privy to any training which the third respondent would have received from the applicant. The rulings made by the second respondent resulted in there being numerous arguments between him, Mr Boswell and Mr Harmse. After the evidence of these witnesses the applicant applied for a postponement of the matter but it was refused by the second respondent.

[13] The applicant indicated to the second respondent that it had more witnesses to call but that none of them were present at the arbitration proceedings and still asked for the matter to be postponed and indicated that it was in any event at the end of the day. The second respondent informed the parties that he would work until he would complete the matter, even if it meant working at night. It was then about 16h45. When the applicant could not call any further witnesses, the second respondent asked if Mr Boswell was closing his case. Mr Boswell said that he was not closing his case. Mr Boswell asked to be allowed to go to Pretoria to pick up his children from school. The second respondent said that no time was set at which the matter would be completed. He indicated that he had cases for which he sat until 19h00 and even 20h00 because matters had required to be finished.

[14] Mr Boswell indicated to the second respondent that the applicant came for the arbitration proceedings with the hope that there would be a pre – arbitration hearing. He said that the applicant did not know what case to meet and needed the pre – arbitration proceedings to be held. He was still asking for the matter to be postponed. Mr Boswell indicated that the applicant was faced with a difficulty of having had to attend to two arbitration proceedings on one day. One had been held in Pretoria in the morning and the second was the one in progress. The second respondent then refused the application for a postponement and he indicated that he would not even hear the other side. When Mr Boswell was unable to call the next witness, the second respondent closed the case of

the applicant. Mr Boswell recorded his objection to his case being closed.

[15] The third respondent was then called and he testified. The first charge dealt with was of the processing of a cash refund. The third respondent said that he was not the person who processed it but that one Mr Moosa Sabier had done it. The second charge related to the removal of a braai stand from the shop premises. The third respondent admitted having removed it but said that he had paid for it with his money. He said that it was in June when he purchased the braai stand. In July there was an allegation that he had stolen the braai stand. He then brought the original slip and showed it to the shop manager and that such production was done in the presence of a securing guard. He said that the slip had been signed by the security guard who confirmed such signing. He said that he had made two copies of the original and kept them. He said that the branch manager had kept the original slip and had apologised to him for the incident. He said further that the branch manager had called one Mr Mamakwe who was the person that had lodged a complainant. The head of security and the Human Resources Director were also called. It was in their presence that he produced the slip and it was on 17 July 2002.

[16] The third respondent said that it was three weeks later that he was called by a financial manager of the applicant and was again confronted on exactly the same issue of the braai stand. He said that he produced a copy of the slip as the original was still with the

branch manager. He said that he was again confronted on the same matter for the third time and thought that was then about six months later, December.

[17] The third respondent produced a copy of the till slip (it was referred to as an invoice). Initially Mr Boswell objected to the production and filing of that slip on the basis that the slip could pertain to any one of the braai stands. Once it was shown that the invoice number on the slip corresponded with the invoice number in the charge sheet, Mr Boswell withdrew his objection and said that it was an invoice the third respondent had been asked to produce. He agreed further, to the slip being handed in by consent. The slip was received as an exhibit.

[18] The charge which was then dealt with related to the removal of timber on 12 November 2002 from the shop yard to the premises of a customer. The evidence of the third respondent was that he was authorised by a branch manager, one Mr Johnny Kruger. He said that there was an invoice from the construction customer for the timber in question.

[19] The last charge was of driving the company vehicle whilst he was drunk or under the influence of liquor. He denied it and said that he was not subjected to any alcohol testing on 12 November 2002, a day it was said he committed the offence.

[20] Before Mr Boswell began to cross – examine the third respondent,

Mr Boswell asked for the matter to stand down for a while so that he could make a telephone call to make arrangements for his children. The stand down was granted. On resumption, Mr Boswell put it on record that the applicant was contesting the validity of the cash register slip which had been handed in. He asked the second respondent to make a ruling on that. An argument ensued on this aspect between Mr Boswell and the second respondent. Mr Boswell was saying that he was withdrawing his consent to the handing in of the cash slip and the second respondent was saying, it was then a matter for arguments later and he linked the withdrawal of consent to a stand down to make a telephone call, to which link Mr Boswell took ambridge.

[21] After the case of the third respondent was closed, Mr Boswell indicated that he was not ready to address the third respondent on the merits of the case and he requested that written submissions be handed in. Mr Duvenhage indicated his readiness. The application for handing in written submissions was refused. An application for the matter to stand down for a few minutes to prepare was however granted.

The award

[22] The second respondent found that the two witnesses called by the applicant were of no help in that they did not testify about the commission of the offences in question. He found that the only

evidence led before him regarding the commission of the alleged offences was the evidence of the third respondent who stated that he did not commit any of the charges that were set out in the charge sheet. The second respondent found that the explanation by the third respondent regarding charges against him was more than satisfactory. He found that the applicant had failed to dismiss the onus imposed on it in terms of section 192 of the Act and he found the dismissal of the third respondent to have been unfair.

[23] The second respondent then ordered the applicant to reinstate the third respondent from the date of dismissal, on terms and conditions not less favourable than those that existed prior to the third respondent's dismissal. Further, he ordered the applicant to pay the third respondent R 264 000 in lieu of salary that the third respondent had lost as a result of the dismissal.

[24] It is this award which the applicant seeks to have reviewed and set aside.

Grounds for Review

[25] Three grounds for review have been identified by the applicant for the review of the award. There are:

1. Misconduct in relation to duties as an arbitrator,
2. Gross irregularity in the conduct of arbitration proceedings.
3. The absence of a rational objective basis justifying the connection made by the commissioner between the material properly available to him and the

conclusion he arrived.

[26] The applicant identified three circumstances in respect of which the applicant alleges that the second respondent's award is reviewable. They are:

1. A refusal by the second respondent to grant the applicant a postponement of the arbitration proceedings;
2. Bias on the part of the second respondent.
3. The compensatory orders made by the second respondent.

Analysis:

[27] In terms of rule 7(A) (8) (a) of the rules of Court, the applicant served and filed its supplementary affidavit on 30 September 2004. The third respondent had 10 days within which to serve and file his answering affidavit but only did so on 15 October 2004. He has asked that such one day late serving and filing be condoned and the applicant has indicated that it is not opposed to the application being granted. Having applied my mind to the applicable legal principles, the application is granted.

[28] The applicant's detailed reference to another disciplinary enquiry which did not form the subject matter of the present dispute is irrelevant and is thus struck out.

[29] Section 145 of the Act states that:

"(1) Any party to a *dispute* who alleges a defect in any arbitration

proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in part 1 to 4, or section 17, 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph (a) within six weeks of the date that the applicant discovers such offence.

(2) A defect referred to in section (1), means –

(a) that the commissioner –

(i) committed misconduct in relation to the ,duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

b) that an award has been improperly obtained".

Misconduct

[30] The case of **Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naiker and others (1997) 18 ILJ 1393 (LC)** caused Landman J to have to examine the meaning of misconduct. His answer to this vexed question was given in ten points. Three of the

ten points are:

> "(5) for there to be misconduct there must have been some 'wrongful or improper conduct on the part of the commissioner. See Dickenson's case at 176. Some personal turpitude is required.
> ……..
> (7) The ordinary meaning of misconduct will not embrace a *bona fide* mistake of law or fact. See Dickenson's case at 176
> ……..
> (9) A gross mistake of law or fact may be indicative of misconduct in the sense described above…."

[31] In **Stocks Civic Engineering (Pty) Ltd v Rip No and another (2002) 23 ILJ (LAC)** Zondo JP, in his judgment, said that the case law on misconduct by an arbitrator evidences tension between the requirements of speed and finality in arbitration (and therefore a minimum of interference by the Courts) and the requirements of fairness (which is a public policy consideration and also the supposition upon which the arbitrators appointment is based.

Gross irregularity

[32] An irregularity in this sense will inevitably relate to the procedure adopted in the course of the proceedings either of a tribunal, a Court or in the arbitration proceedings. It will therefore not mean or relate to an incorrect judgment. It refers not to the result but rather to the method of a trial. The consequence attendant to there being a gross irregularity is that the aggrieved party will have been prevented from having his or her case fully and fairly determined.

See **Ellis v Morgen ; Ellies v Desai 1909 TS 576** at 581 and **Goldfields Investments Ltd and another v City Council of Johannesburg and another 1938 TPD 551 at 560.**

Justifiability and rationality

[33] When dealing with the standard of review, Froneman DJP (as he was) in **Care phone (Pty) Ltd v Marcus NO and others (1998) 19 ILJ 1425 (LAC)** had this to say:

> "[30] It appears from a number of High Courts that the effect of particularly, the administrative justice section in the Bill of Rights is seen as broadening the scope of
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> Judicial review of administrative action (See Tseleng v Chairman, unemployment Board and another (1995) 16 ILJ 830 (T)…
>
> [31] The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it (S 33 and item 23 (b) of schedule to the constitution). This provision introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety. But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal".

A refusal to postpone arbitration proceedings.

[34] I have been able to glean from the record of pleadings that, at the commencement of the arbitration proceedings, the applicant applied, albeit with no success, for the proceedings to be postponed. This would have taken place before the proceedings were mechanically recorded as the transcribed record of the proceedings bears no reference to such an application.

[35] There would have been discussions between the parties and in the presence of the second respondent for the second respondent to have began the mechanically recorded proceedings by recording issues which he found to have been common cause between the parties. In doing so, he however made no reference at all to there having been an application for the postponement of the arbitration proceedings as at that stage.

[36] The view I have of the second leg to this application for postponement compels me to say no more in relation to the first leg.

[37] Once two witnesses of the applicant had testified, the applicant indicated to the second respondent that it had a number of witnesses that were crucial to its case who were however not present at the hearing. It was also indicated to the second respondent that the applicant would not close its case at that stage.

The second respondent reminded the applicant's representative that he had told them that they would proceed until the matter would be finished. The applicant's representative pointed out that he had to pick up his children at school in Pretoria. The second respondent indicated unequivocally that he would proceed with the matter and he said that he had been sitting with matters until 19:00, 20:00 because matters required to be finished. The time was then around 16:45, according to the second respondent, as they could not even agree on it.

[38] The applicant's representative said that the applicant had asked for pre – arbitration hearing so that they would know how to prepare for the case. He said that they had other matters pending in Pretoria (referring to other CCMA matter which had been schedule for 19, 20 and 21 January 2004 and had already been postponed on that very day for applicant to attend to this case in Johannesburg).

[39] A discussion ensued between the second respondent and the applicant's representative. The second respondent then asked if the applicant's representative was making an application for a postponement and an answer in the affirmative was given. The following exchanges then ensued –

"**Commissioner**: I am not going to hear the other side, the Application is refused. Are you going to call your next witness?

Mr Boswell: Mr Arbitrator we would like to call our next

….. (Intervenes)

Commissioner: Please call them. If they are not here, I will close your case for you. I am going to record now that your witness is not present and that you are unable to call them and that I have ruled, I have refused the application for an adjournment and that I am proceeding with the matter.

Mr Boswell: As it (indistinct) we object to that the (indistinct) you want to close our case (indistinct).

Case for the respondent."

[40] I have no qualms in finding that the attitude of the applicant of coming to the arbitration proceedings with the expectation that it would necessarily be granted an indulgence of the hearing being postponed was unreasonable in the circumstances. The applicant was faced with having to attend two arbitration proceedings of the CCMA in Pretoria and in Johannesburg on 19 January 2004. The proceedings in Johannesburg, and for this case, were scheduled to commence at 14H00. The reason why the applicant did not make arrangements for witnesses for this matter have remained illusive throughout these proceedings.

[41] However, once the applicant had lodged an application for the proceedings to be postponed it behoved of the second respondent to have acted in compliance with the duties of a commissioner. He had then to listen to the merits and demerits of the application from both parties; he had to apply his mind to the issues at hand and had to consider among others –

- Whether it was in the interest of justice and fairness that the postponement be granted or refused.
- What prejudice was likely to be suffered by either party should the postponement be granted or refused;
- Whether such prejudice could be cured by an appropriate order
- Whether the application was *bona fide* or a mere tactical manoeuvre

See **Petzer v Independent Broadcasting Authority (2000) 5 LLD 409 (LC) at 410**, per Molahleli AJ.

[42] In the transcript of the proceedings it is manifestly clear that the second respondent would not hear the reaction of the third respondent to the application for postponement. Yet in the award he states –

> "The representative of or the applicant (the third respondent in this case) opposed the said application on the basis that the applicant would suffer prejudice if the matter was postponed because it was nearly a year since applicant had been dismissed from employment and it was in the interest of all parties concerned that this matter was brought to finality".

[43] There never was an opposition to this application by the third respondent. To the extent that the second respondent has made an error of fact, he has misdirected himself. It might very well be so that the granting of the application would result in the third respondent suffering prejudice in that the resolution of the

dismissal dispute would be delayed. It was incumbent on the second respondent to investigate the circumstances of such prejudice and to decide whether or not it could not be cured by an appropriate order. The second respondent relinquished this important duty as a commissioner and thus committed a gross irregularity. If he had conducted this investigative task, he might have found that the third respondent might have been content with a costs order in his favour. It has to be borne in mind that any delay in the matter not having been heard earlier was due only to the fault of the third respondent.

[44] The reason which the second respondent has given in his award for refusing to grant the postponement of the arbitration proceedings is not supported by the evidential material which was available to him. This must have eluded Mr Branford who appeared for the third respondent in his opposition to this application. The unavailability of further witness of the applicant can not reasonably be justification for a commissioner to abandon the duties given to him by law. Consequently, there is no rational objective basis justifying the connection made by the second respondent between the material properly available to him and the conclusion he eventually arrived at. I need look no further to review and set aside this arbitration award.

[45] The demand of law and fairness of this case inform me that the costs should not necessarily follow the results.

ORDER

1. The arbitration award dated 23 January 2004 issued by commissioner Steve Dawson in case number G 13265 – 03 is reviewed and set aside.
2. The matter is remitted to the CCMA for a *de novo* hearing before another commissioner.
3. No costs order is made.

CELE AJ

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Date of hearing : 27 September 2004

Applicant Counsel : Adv L.M Malan
Instructing Attorneys : Bowman Gilfillan Inc
Respondent's Counsel : Adv D.J Branford
Instructing Attorneys : Serfontein Viljoen & Swart Attorneys
Date of Judgment : 31 January 2006