IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

CASE NO: D774/05

In the matter between:-

TOP TURF GROUP (PTY) LIMITED	APPLICANT
And	
LOVEDAY SHEZI	FIRST RESPONDENT
DUMISANI GIFT NHLANGULELA	SECOND RESPONDENT
PATRICK SANDILE MZINDILE	THIRD RESPONDENT
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	FOURTH RESPONDENT
SULLIVAN, PHILLIP LESTER *nomine officcii*	FIFTH RESPONDENT
TRAFALGAR PROPERTY MANAGEMENT (PROPERIETY) t/a TRAFALGAR POTS AND GARDENS	SIXTH RESPONDENT

JUDGMENT

CELE J

INTRODUCTION

[1] The application before me is one in terms of section 145 of the Labour Relations Act, 66 of 1995, where the applicant seeks to have an arbitration award dated 1 November 2005 issued by the fifth respondent under the auspices of the fourth respondent reviewed, set aside and substituted in terms of section 145 of the Act.

[2] The first to the third respondents, (hereafter referred to as

employees), opposed the application in their capacity as the erstwhile employees of the applicant. The arbitration award in question was issued in their favour.

[3] On 1 December 2004 the applicant took over the garden business including the personnel and customers from the sixth respondent as a going concern. The employment services of the employees were accordingly taken over by the applicant. From here onwards I will therefore refer to the applicant as being the employer or anything to do with the employer relating to the applicant knowing though that, when the incident in question took place the transfer had not taken effect. I am mindful of the consequences of section 197 of the Act when it comes to the transfer of business as a going concern.

[4] On 13 May 2004 a van of the applicant was driven in the vicinity of Berea and Cleaver Road in Durban. An employee by the name of Alfred was operating it as a driver. It carried a number of other employees of the applicant on its back including the three employees before me. In all, they appeared to have been nine in number. All were clad in the uniform of the applicant so they were easily identifiable with their employer. At approximately 9h15 the bakkie came up to where there was a blue Polo motor vehicle that had stopped at a red robot. It was driven by a Mr Potgieter who then proceeded to purchase a newspaper from a street vendor. The street vendor seemed to have taken a slow pace in transacting the sale and in giving the change. That was to the point that the red robot turned green, it turned red, it turned green again and again it turned red, so there was a bit of some time when the transaction was taking place.

[5] Alfred driving the bakkie started blowing the hooter at Mr Potgieter for the delay that was caused because he could not drive further as the Polo was on his way. The version differs and there is a dispute of facts about which of the two alighted from which motor vehicle. The one version being that Alfred alighted, another being that Potgieter

alighted but a fracas developed between Mr Potgieter and the occupants of the bakkie.

[6] There was a lady on the street who was watching what was going on. She had just left her place and she had come to supervise the sale of the junk mail that she was interested in. She is a Miss Geraldine Thomas. It turns out that in fact Mr Potgieter had been purchasing a Mercury. She watched what was going on and she also then testified at the subsequent arbitration. The matter or the incident between the bakkie and the Polo was subsequently reported to the police by Alfred and his team. It also subsequently came to the knowledge of the applicant and nine employees were subjected to a disciplinary hearing and they were dismissed. The three employees before me, for purposes of this case, referred an unfair dismissal dispute for conciliation and arbitration. The fifth respondent was appointed to arbitrate the dispute.

[7] He found in favour of the employees as already stated and he ordered the applicant to re-instate the employees. As a result of that finding the applicant was aggrieved and then initiated the present application,

The grounds for review

[8] Mr Jafta for the employees has pointed out that no clear grounds for review have been traversed or covered in the review application. The only apparent review ground that is in the papers before me is framed in the following manner:

> "The review of the award is essentially sought on the basis that the fifth respondent reached various conclusions which have no nexus in logic or in fact to the evidence lead".

I interpret this for the benefit of the applicant to mean that the fifth respondent issued an award which is not reasonable. I approach it in that manner simply because Section 145 of the Act has been suffused by the ground of reasonableness and therefore the question is whether or not the decision reached by the fifth respondent is one that

a reasonable decision maker could not have reached.

[9] With that in mind I then proceed to look at the chief findings that were made by the fifth respondent. He found against Miss Thomas as a witness. Miss Thomas would normally be ranked as an independent witness in the sense that she was not a party to the applicant's employer's team. She was neither a party to Mr Potgieter. She did not know him. She therefore ranked as a neutral person so to speak, but the fifth respondent took the position that in his view Miss Thomas was bias in favour of Mr Potgieter. He expressed this by saying that Miss Thomas' comment was that, Mr Potgieter was only buying a newspaper, meaning that Alfred was being unreasonable in the circumstances and ought to have been patient and to wait for Mr Potgieter whilst he was being serviced by the street vendor.

[10] I do not think it is a fair criticism levelled against the fifth respondent. In my view, when a car is at a robot which regulates traffic and he jams traffic in the manner that Mr Potgieter did the natural reaction would have been to say, yes he needs to buy a paper but he must be considerate. A person who operates a motor vehicle on the public road is expected to be considerate to other road users. If one were to countenance a behaviour such as this one there would be chaos in the public roads. So the behaviour of Potgieter was really uncalled for. It was reprehensible.

[11] The reaction of Miss Thomas towards that kind of behaviour was somewhat strange. In fact I think I understand why the fifth respondent commented as he did about her, to say oh! well after all she is to some extent involved in the sale of newspapers. He refers to it as a profession. It is not a profession but really there is – because she was involved in the sale of the junk mail, Mr Potgieter was buying a Mercury, I heard Mr Nel suggesting that there is a competition between the sale of the junk mail and the Mercury. You have here customer who is interested in buying newpapers in general. She

potentially might want to buy both of them for that matter. One day she might want to buy the junk mail but I think that is beside the issue. Her reaction was strange in the circumstances.

[12] He went on to find that Miss Thomas' memory failed her and assessed her evidence on those basis and then intended to reject her version. It would appear from the minutes of the disciplinary hearing that Mr Potgieter actually admitted having come towards Alfred where Alfred was. I am aware that Mr Potgieter did not testify at the arbitration hearing which is a *de novo* hearing. Preference has however been made to his evidence. That version regrettably has not been subjected to scrutiny or to cross-examination and to further testing in a *de novo* hearing. This is intended to support the version of the employees, that it is Potgieter who came towards the bakkie and Potgieter said so and the employees said the same. It appears therefore that Miss Thomas lied about that evidence. She may have lied by mistake, by confusion of the events or because of the time factor or whatever consideration but it is clear and therefore the fifth respondent has a reason to doubt the veracity of her evidence when it comes to these events.

[13] I am approaching the assessment of the evidence in this respect for a reason. I am mindful of the fact that the concentration today was more about a failure to report a wrong doing by the employees to their employer. What is that wrong doing that they should have reported? That then takes me back to why I have approached the assessment of the evidential material in this respect. There is a dispute about who assaulted who if there was an assault. Again when I revisit the evidence of Mr Potgieter in the disciplinary hearing it seemed to be that he really was not assaulted in the sense of being touched by anybody because his evidence suggest that attempts were made to deliver blows towards him but they did not reach him for some reasons that seem to suggest that something stopped those that were advancing towards him from reaching him. We are talking of nine

people that were in that motor vehicle. I am mindful of the fact that there were, I think about, two ladies. Perhaps they may not have taken part but the rest of these other men, if they wanted to reach him, if they wanted to assault him one would have expected that they would have done so. If Mr Potgieter says they attempted to but they did not reach him, they did not succeed in reaching him then what kind of assault was worthy of reporting to the employer remains the question.

[14] The chairperson sketches out the scenario of a person who had been assaulted *vis-á-vis* the version of the employees which was in their statements namely that they did not commit any assault and they were invited to explain who did the assault. In response people might be quiet to see a person who sees an assault when there was none. Mr Potgieter did not testify that he was hit, or physically assaulted. Even as I say so I am mindful of the fact that feigning a blow towards a person may, be described in criminal court as an assault in that language but I do not understand that to have been the issue because here the impression was created in the mind of the chairperson at the disciplinary hearing that Mr Potgieter was assaulted and secondly that his motor vehicle had been kicked at and therefore damaged.

[15] It seems to me that from the manner that the fifth respondent assessed this evidence he cannot be criticised for rejecting the evidence that was lead on behalf of the applicant. It might well be that there were discrepancies in the evidence of the employees but that evidence brought into the arbitration was of a nature as to justify the fifth respondent in arriving at the conclusion which he reached.

[16] The way that he went about assessing it I would not go so far as finding that he reached a decision that a reasonable decision maker could not have reached.

[17] The second leg of the inquiry which I am invited to engage in relates

to the question whether or not having found that the dismissal was unfair it was appropriate to re-instate the employees. The evidence of the applicant was that it had newly taken over this business. It was entitled to restructure its business as it saw fit and that being the case the commissioner should have found that it was not appropriate to re-instate in the circumstances.

[18] Section 193 is structured in such a way that where a dismissal is found to be unfair re-instatement is a default remedy. It is one that one firstly thinks of but once one has reached that point one then begins to think whether it is appropriate to re-instate. If however an employee does not want to be re-instated the commissioner or the labour court might not re-instate or if it is not appropriate in the circumstances, reinstatement will not be ordered.

[19] Mr Nel has addressed me and as he pointed out that the only evidence there was in this respect was of the applicant in relation to the inappropriateness of re-instatement. It must be remembered that the presence of the evidence is not conclusive. Evidential material must be used by an assessor of facts to arrive at an appropriate decision. The fifth respondent was seized with a situation where he had then to look at this evidence and decide whether re-instatement was appropriate. He did look at the evidence before him. The approach by the applicant is that re-instatement was not appropriate simply because it had testified to that effect.

[20] A commissioner may find that in the circumstances, re-instatement may be difficult but not inappropriate because here it is a question of a degree. The commissioner may find that it is necessary to re-instatement and that if the employer has any difficulties the employer will act within the precincts of the labour law. For instance he could then begin to embark on retrenchment. There are advantages in following that approach. It might be found for instance that in selecting criteria some of the employees that have been re –instated

are entitled to be retained because there are new ones who have to be retrenched. It might even be that there may be people who volunteer to go to early retirement and therefore there are so many other considerations that can come into play. It does not mean that the presence of a difficult to re-instate necessarily means that the employees must be compensated only.

[21] In this instance I am also not of the view that the decision reached by the fifth respondent is one that a reasonable decision maker could not have reached. I then consider the last aspect, it relates to the question of costs. I do not think in the circumstances it will be fair to award the costs order against the applicant in this case. In the circumstances therefore:

1. The application for the review of the arbitration award dated 1 November 2005 issued by the fifth respondent in this matter is dismissed.
2. No costs order is made.

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CELE J

DATE OF HEARING : 19 MARCH 2009
DATE OF JUDGMENT : 19 MARCH 2009

APPEARANCES

FOR APPLICANT : Adv A.J NEL
Instructed by : DEAN CARO & ASSOCIATES

FOR RESPONDENT : Mr. P.O JAFTA of JAFTA INC.