IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1490/16

In the matter between:

ABBEY NARE NCHOE	**1ST Applicant**
EMMANUEL MAMOTSIETSA NCHOE	**2ND Applicant**

And

CASTLE LEAD WORKS (PTY) LTD	**1ST RESPONDENT**
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL (MEIBC)	**2ND RESPONDENT**
DAVE SMITH N.O	**3RD RESPONDENT**

Heard: Delivered: 29 August 2019
Summary: 18 December 2019

JUDGMENT

MABASO AJ:

Introduction

[1] The question in this judgment is whether the Third Respondent reached a conclusion which a reasonable decision-maker could have reached taking into

account the evidence presented during the arbitration hearing, as he was required to decide the substance of the dispute between the parties.[1] The review application was launched more than three weeks out of time, and the applicants delivered an affidavit explaining the delays. I am of the view that the delay is not excessive, therefore, on this point alone, the late delivery of the review application is condoned.

[2] The applicants (Messrs Abbey Nare Nchoe and Emmanuel Mamotsietsa Nchoe) were dismissed on 4 August 2014 following the finding of guilty relating to a charge of demanding that the labour broker employees *"to buy them airtime and/or Cold drink for working overtime"*. All three charges, that resulted to their dismissal emanate from this charge. Following their dismissal, they declared an unfair dismissal dispute against the First Respondent before the Second Respondent. The latter appointed the Third Respondent to arbitrate the dispute, which resulted in the arbitration award under review.

Brief background

[3] Both applicants worked as Supervisors for the First Respondent. It was alleged that since around 2010, they were demanding airtime vouchers from certain employees, who were based at the First Respondent but were employed by labour brokers. It is necessary to reproduce the charges that resulted to the applicants' dismissal. They read thus:

> *"1 it is alleged that you requested some employees in particular labour brokers employees to buy you airtime and/or Cold drink for working overtime.*
>
> *2. It is alleged but you misused/abused your position as Supervisor by accepting airtime/and or cold drink from some employees who were working overtime.*

[1] CUSA v Tao Ying Metal Industries and Others2009 (2) SA 204 (CC) at para 65.

> *3.* ***It is alleged that you brought the company in disrepute by dishonestly putting some employees under the impression that it is accompanied practice to pay or to buy airtime or cold drinks when they are requested to work overtime****."*[2]

[4] All the three charges are interrelated, and charges 2 and 3 indicate that the issue is about misrepresentation. I must indicate that the issue as to whether or not those employees believed that the applicants had an influence was not the primary issue, but the main issue was "putting some employees under the impression that it is a company practice to pay or to buy airtime or cold drinks" in exchange for overtime work/favours.

[5] In summary, the evidence before the Third Respondent was thus: Mr Reginald Madito (Mr Madito) testified that when they joined the First Respondent an induction was conducted by Mr Abbey Nchoe, who then gave them his contact details and said that after their first payment, they must buy him an airtime voucher (the airtime voucher). Following his first payment when he did not buy the airtime voucher, Mr Abbey Nchoe approached him to inquire why he failed to comply with his demand, he then explained the reasons which resulted to him starting to experience challenges and he gave examples about the allocation of uniforms. And he was told by Mr Abbey Nchoe that he was disadvantaged because he had failed to adhere to the instruction.

[6] Ms Ellen Veldhoven stated that one of the employees of the First Respondent resigned following intimidation from two of the Supervisors who were extorting money from them, by asking them to buy airtime vouchers. Both the Supervisors were subjected to polygraph tests which the results were not in their favour.

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[2] Court emphasis.

[7] Mr David Khumalo testified thus: in his department, there was no overtime worked. He then approached both Applicants to ask them if they can let him work overtime in their department. Then Mr Abbey Nchoe advised that he will let him work overtime but must buy him an airtime voucher. He ended up buying R24.00 airtime voucher, then he experienced no further problems. Mr Emmanuel Nchoe asked for cold drinks, and he complied with this request.

[8] Mr Moses Kubeka (Mr Kubeka) testified that he was a shopsteward. He was approached by Mr Madito complaining that he was buying airtime vouchers for the applicants. A general meeting was held where this issue was discussed, and Mr Madito repeated these allegations, and Mr Khumalo confirmed that he was also a victim. The matter was not immediately reported to the Human Resource Department.

[9] Mr Charles Rudolf Meyer (Mr Meyer) was employed as a Production Director. He explained that if there is a need for overtime, he would ask a Supervisor *"if anybody did ask for any overtime, then [he] will take it further from there".* He confirmed that sometimes the Supervisors would come to him with a list of people who wanted to work overtime.

[10] Mr Manganyi stated that: when the First Respondent was closing for the December holidays, he was approached by Mr Abbey Nchoe who demanded that he buys him cold drinks if he wanted to continue working for the First Respondent on the following January. He then bought a cold drink. He accused Mr Emmanuel Nchoe of demanding something then he reported this to Mr Marcus.

[11] The applicants denied all the allegations levelled against them.

[12] At the conclusion of the arbitration, the arbitrator issued the arbitration award, concluding that the applicants were guilty of the charges against them. Therefore, the dismissal was both procedurally and substantively fair.

<u>Grounds for review and analysis</u>

[13] The applicants are challenging the award, specifically the reasoning of the Third Respondent, as they contend in summary that.

[14] It is alleged that the Third Respondent committed gross irregularity in respect of the weight that he put to the notes of the meeting where the complaints and allegations are recorded. The applicants contend that the issue before the Third Respondent was not whether the notes were fabricated or not, but whether both of them committed the offences, which resulted in their dismissal. The applicants say that the notes show that there was a complaint laid against them but cannot be said to be "powerful" evidence which proves the guilty verdict. Further, it is alleged that the evidence of the shopstewards was not in line with the notes.

[15] They also contend that the finding by the Third Respondent, that they were in the position to influence the issue of overtime and secure contracts, is not based on the evidence and the facts that were presented before the arbitrator. Further that the evidence presented does not support the conclusion of the Third Respondent.

[16] They say that the Third Respondent failed to apply his mind to all the facts and evidence presented before him as they contended that even from the disciplinary hearing stage they said they could not ask for airtime vouchers in exchange for overtime as the allocation of overtime is the duty and responsibility of the Production Manager.

[17] They also submit that the arbitrator failed to take into account the credibility of the witnesses that presented evidence on behalf of the First Respondent.

[18] In *Herholt*, the SCA,[3] sent the following warning regarding review applications—

[3] Para 5.

> *". . . 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…"*

[19] In the matter of *CUSA v Tao Ying Metal Industries &Others*,[4] the Constitutional Court held that an arbitrator in order to perform their duties effectively,

> *"…Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties.* ***They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively****, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do"*[5]

[20] In the *House Of Flowers and Others v Radebe and Others* the LAC[6] held thus,

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[4] Above fn 2.

[5] Own emphasis.

[6] (JA53/2012) [2013] ZALCJHB 337

"[17] The Commissioner had two mutually destructive versions before her, and the only issue she was required to decide on was whether or not the employees discharged the onus to her satisfaction that they were dismissed on 11 November 2009. ***In deciding the issue, the commissioner had to weigh up the evidence, apply the probability test and then if need be to determine the credibility of the witnesses****. The commissioner did do this. Having regard to the evidence, it cannot be said that the decision to accept one version over another is tainted with a failure to consider all the material evidence. Nor is her decision in this regard open to serious criticisms. I fail to see any irregularity let alone a gross irregularity committed by the commissioner*[7]

And

"[18] The second complaint is linked to the first. It deals with the material error committed by the commissioner in finding Kelly's evidence incoherent. ***Again, a reading of her award makes it clear that the commissioner was simply of the view that the employee's version was more probable than that of the appellant and again based on the evidence before her this is a reasonable view to hold****. There is no explanation as to why Kelly required them to complete the work for 12 November on 11 November nor was it challenged that she did not tell them that all of them could be easily replaced. Furthermore, by her own admission, the work she had to execute in the weekend could be done (at an inconvenience) without the employees.*

[21] As I have indicated above that errors of facts are not themselves grounds for review and setting aside of an arbitration award, what is required is that one has to take into account the totality of the evidence before an arbitrator. In this matter, the Third Respondent was required to determine as to whether the

[7] — own emphasis.

applicants demanded favours from the employees in question, in exchange for services (inter alia overtime) to be granted to them and/or rendered.

[22] I have perused the arbitration award and the transcribed records of the same arbitration, clearly, there was evidence that was presented before the Third Respondent that sometimes the applicants, as Supervisors, will have an input as to who will work overtime as per Mr Meyer's summarised evidence in paragraph 8 above. Even in the founding affidavit, the applicants correctly summarise the evidence of Mr Meyer, which shows that they had influence in certain circumstances, as they say:

> " *If they is overtime in your department you are guaranteed to work overtime, unless you are unavailable that weekend.*
> *"Further, where your department is short of workers for overtime, the supervisor can make recommendations to the production manager would make a final decision based on the skill and experience of work*."

[23] In paragraph 38 of the award, the arbitrator concluded based on the evidence as mentioned earlier where he said both Messrs Madito and Khumalo believed that both applicants were in a position of influence regarding the issue of overtime. Based on the foregoing, the grounds of review that the Third Respondent committed reviewable irregularity in respect of his findings cannot succeed, and he cannot be said to have failed to apply his mind to the facts before him. I conclude that the Third Respondent decided the issue that was before him.

[24] Subsequent to concluding that the applicants had influence especially in respect of overtime, as they conceded during the arbitration, the Third Respondent proceeded to decide as to whether the applicants committed the misconduct. The arbitrator summarised the evidence that was presented before him, applied the probability test and concluded that he prefers the version of the First Respondent as compared to the Applicants' version.

[25] As I had indicated that I looked at the evidence presented before the Third Respondent, if one were to look at the notes of the meeting, in paragraph 12 above , one might say that the Third Respondent committed irregularity. However, it is important to remember that what is required is the totality of evidence that was presented before the Third Respondent. If it is found that the outcome is unreasonable, then the award would be set aside.

[26] In this matter, I have taken into account the totality of the evidence presented before the Third Respondent specifically the *viva voca* evidence of the witnesses and the notes of the meeting, I conclude that they point to one direction, that indeed the applicants did demand favours from their subordinates. As to whether or not the subordinates believed that the applicants had influence or not could be a deciding factor as charge three clearly shows that the charges relate to misrepresentations made to the employees.

[27] As stated in the *House of Flowers* authority, credibility will only been relevant if need be. In *casu*, I do not think the Third Respondent needed to move to the credibility enquiry as there was enough evidence relating to the charges that were levelled against the applicants.

Order

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

1. Condonation for the late delivery of the review application is granted.
2. The review application is dismissed.
3. No order as to the costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr MA Myambo

Instructed by: DE SWART VOGEL MYAMBO ATTORNEYS.

For the Respondent: Adv E Tolmay

Instructed by: WEBBER WENTZEL ATTORNEYS.