



LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA 21/22

In the matter between:

PIONEER FOODS (PTY) LTD t/a ESSENTIAL FOODS Appellant

and

L. SHEAR N.O. First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION** Second Respondent

N. MUTELE Third Respondent

K. MULAUDZI Fourth Respondent

Heard: 19 September 2023

Delivered: 18 October 2024.

Coram: Molahlehi DJP, Smith AJA et Malindi AJA

JUDGMENT

MALINDI, AJAIntroduction

[1] This is an appeal against the whole of the judgment and order of the Labour Court (per Nhlapo AJ), delivered on 22 January 2021.

[2] The appellant contends, first, that the Labour Court erred in failing to find that the first respondent, Mr L. Shear, acting as Commissioner under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) committed misconduct, alternatively, a gross irregularity, in not permitting the appellant to properly present its case in arbitration proceedings and thereby depriving it of a fair trial.

[3] Secondly, that the arbitrator committed misconduct by being biased against the appellant.

[4] And thirdly, that the arbitrator misinterpreted the law pertaining to hearsay evidence and incorrectly allowed such evidence outside the parameters of section 138 of the Labour Relations Act¹ (LRA).

[5] The appellant contends, on the whole, that the Labour Court ought to have reviewed and set aside the arbitrator's award delivered on 30 November 2017 in which the arbitrator found that the dismissal of the two employees, the third and fourth respondents, was substantively unfair.

[6] The appeal is opposed.

Background

¹ Act 66 of 1995, as amended.

[7] The following background facts are mostly common cause. The two employees, Mr N. Mutele and, Mr K. Mulaudzi, were the appellant's driver/salesman and delivery assistant, respectively. On 2 December 2016, they came across a Coca-Cola truck that had lost its load on a motorway. Passers-by and other people descended on the Coca-Cola truck and helped themselves to the bottles of Coca-Cola on the ground and the truck.

[8] The two employees were charged with having stopped their vehicle (branded SASKO) at the scene and taking part in the looting, thereby putting the appellant's name into disrepute.

[9] The appellant relies on a report in the Daily Sun Newspaper, social media posting on Facebook and the Citizen Newspaper.

[10] The Daily Sun reported that a "Sasko Truck" driver was seen running from his truck to help himself to a few drinks that he took back to his truck. The appellant was able to identify the truck and its drivers from the photographs included in the article. The Citizen quoted an eyewitness or a local Glenvista Community Policing Forum member as saying: "*even a Sasko delivery truck stopped and loaded some stolen stock*". The appellant's trucks are branded "Sasko". The appellant's evidence was entirely based on these reports.

[11] Before the arbitrator, only Mr M. Moeng, the chairperson of the internal disciplinary hearing and the appellant's credit manager, testified.

[12] The two employees testified that when they encountered the Coca-Cola truck when they were in the process of overtaking it, Crates containing Coca-Cola fell from the truck and scattered on the road. They stopped their truck and assisted the Coca-Cola truck driver and his assistant to clear the road. He thereafter thanked them by giving them a few bottles of the drinks. They had stopped for a mere nine minutes as recorded in the vehicle tracking records.

Grounds of review

[13] The appellant relies on section 145 of the LRA to review and set aside the arbitrator's award on the grounds that:

- 13.1. The arbitrator came to a finding that no reasonable commissioner could come to, alternatively, had committed a gross latent irregularity in the conduct of the proceedings; and
- 13.2. The arbitrator had committed a gross patent irregularity in the conduct of the proceedings by not permitting the appellant to properly present its case.

[14] The grounds were supplemented and the relevant paragraph is reproduced in full in regard to the contention of patent irregularity:

'3.1 The following incidents support my contention that the first respondent had committed a gross patent irregularity in the conduct of the proceedings by not permitting me to properly present the case of the applicant.

3.1.1 When I requested that the third respondent should leave the venue before the fourth respondent commenced with his evidence, the first respondent stated that he did not wish to give me a '*heart attack*'. This was derogatory and uncalled for.

3.1.2 When I indicated that I wish to cross-examine the first witness, the first respondent sarcastically said '*That is what I was afraid of*'.

3.1.3 Whilst I was cross-examining the fourth respondent, I put a proposition to him and the first respondent then asked me '*Where the hell does it refer to looting there*' [In reference to a statement that I had actually contended the witness of the applicant (Mr Moeng) had made]. This discussion concluded by the commissioner stating '*I am not a fool, ok*'.

3.1.4 In response to the question that I posed the commissioner said: '*I have got the whole day. We can sit here until 7. It does not make any bloody difference*'.

3.1.5 When the fourth respondent had finished with his evidence, it was clear that the first respondent did not wish to hear the evidence of the third respondent. [This is starting in a matter where the credibility would play a crucial role.]

3.1.6 During my cross examination of the third respondent, the first respondent made a point that it was common cause that looting had taken place but that it was not clear whether it was off the truck or on the ground, and this was irrelevant. I responded that the individual employees did not accept that looting had taken place and asked whether the first respondent had accepted that version. The first respondent told me not to question him and asked me what my problem was. He then shouted at me. With respect, the issue was not common cause and the first respondent interfered with my attempts to test the credibility of the third respondent and to show him up as an evasive and untruthful witness.

3.2. Accordingly, I submit that the first respondent had deprived the applicant of its right to a fair hearing and I submit that, on its own, it justifies the setting aside the award.'

[15] The appellant submits further that the evidence of the employees ought to have been rejected as lacking probability and credibility. The only grounds raised in this regard were that:

- 15.1. The evidence appeared rehearsed as it was so identical that the arbitrator only referred to the evidence of one.
- 15.2. Mutele had not mentioned that the Coca-Cola driver assistant had opened the door of their truck to load the drinks before his testimony but did so in his evidence in chief only because Mulaudzi, who testified to this effect before Mutele had mentioned it.
- 15.3. The evidence that they left before the road had been fully cleared is improbable.
- 15.4. It is improbable that the looting could have taken place after they had left, as testified by the two employees.
- 15.5. The Coca-Cola driver could not have given them drinks from the truck because Mr Moeng had enquired from Coca-Cola whether company policy permitted or authorised its drivers to hand out Coca-Cola and was informed that as the drivers are not Coca-Cola employees they were not permitted to do so.

The Labour Court judgment

[16] Nhlapo AJ agreed with the Commissioner that the appellant relied on newspaper and Facebook hearsay evidence without having laid the basis for admission of such evidence. The Commissioner had further alluded to double hearsay as it was not clear whether the reports and the Facebook posts were themselves based on hearsay evidence or whether the authors were present at the scene.

[17] The Court further drew an adverse inference because the Coca-Cola driver was not called to testify and no explanation therefore was given by the appellant.

[18] Lastly, the Court found that the arbitrator did not err in not rejecting the evidence of the employees as not being reasonably and probably true in the circumstances where it was uncontroverted.

[19] As regards the existence of any gross irregularities in the conduct of proceedings, the Court found that the arbitrator's intervention did not disclose bias or a denial of the appellant to present its evidence fully. As such, the interventions were directed at pointing out the deficiencies in the appellant's case, especially since there was no direct evidence of the theft. The cross-examination of the employees could not be limitless as a result of a lack of a proper version to be put to them.

The law

[20] The law on reasonable apprehension of bias is whether a reasonable, objective and informed person would, on the facts, reasonably apprehend bias.² Bias is a disposition favourable to one side as opposed to the other, regardless of the facts before an arbiter of facts. As indicated before, the arbitrator's conduct was nowhere near such disposition. After hearing the case of the appellant, he held a *prima facie* view that it had not presented evidence that would outweigh the employees' version. He was entitled to hold such a view, especially because the

² See: *Sasol Infrachem v Sefafe and Others* [2014] ZALAC 54; (2015) 36 ILJ 655 (LAC) (*Sasol*).

appellant had not laid a foundation for, or applied for the admission of the hearsay evidence in terms of section 3(3) of the Law of Evidence Amendment Act³ (Act).

[21] In regard to the alleged irregular conduct by the arbitrator, and therefore a denial of a fair process which affected the appellant's case adversely, reliance was placed on *Chabalala v Metal Engineering Industries Bargaining Council and Others*⁴ and *Satini v Department of Education, Western Cape and Others*.⁵ In *Sasol Inrachim v Sefafe and Others*⁶, a survey of authorities dealing with the test for review under section 145 of the LRA in regard to the misconduct by an arbitrator depriving a party of a fair hearing is canvassed. The Labour Court endorsed the principle that specific conduct that is alleged to give rise to unfairness ought to be alleged. If such conduct has the effect that one of the parties does not receive a fair hearing of their case, it will almost inevitably mean either that the arbitrator has committed misconduct in relation to his or her duties as an arbitrator or that the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings.

[22] The appellant alleges that in this case, there was a denial of full cross-examination, unfair interventions by the arbitrator and an undue favourable disposition towards the employees. These complaints have been demonstrated to be unfounded. The Commissioner has not denied the appellant a fair hearing.

[23] On the complaint of not admitting hearsay evidence, the arbitrator had no obligation to consider the admission of hearsay evidence without an application for such admission. The Act states that:

‘3. Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

³ Act 45 of 1988.

⁴ [2013] ZALCJHB 299; (2014) 35 ILJ 1546 (LC).

⁵ [2016] ZALAC 95; (2016) 37 ILJ 2298 (LAC).

⁶ Sasol supra.

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to—
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice.’

[24] In *S v Ndhlovu and others*⁷ (*Ndhlovu*), the Supreme Court of Appeal explained the rule as follows:

‘Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court’s judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.’

[25] In *Exxaro Coal (Pty) Ltd v Chipane and Others*⁸, the Court applied *Ndhlovu* in an arbitration context and the Labour Appeal Court said that “[t]he same ought to be true for arbitration conducted in an adversarial fashion because fairness to both parties is paramount”.⁹ The fact that the arbitrator rejected, without ruling on the

⁷ [2002] ZASCA 70; 2002 (2) SACR 325 (SCA) at para 18.

⁸ [2019] ZALAC 52; (2019) 40 ILJ 2485 (LAC).

⁹ *Ibid* at para 24.

admissibility of the hearsay evidence, does not warrant the setting aside of these proceedings. The case is distinguishable because the arbitrator was not called upon to decide the issue at any stage of proceedings. The arbitrator held that the failure to call the authors of the articles amounted to no evidence having been led against the employees. In this regard, he was correct as there was no application before him for its admission.

[26] I find it unnecessary to consider whether the newspaper and Facebook articles would have been admissible.

Analysis

[27] The appellant concedes that the newspaper and Facebook evidence it presented is hearsay but contends that the arbitrator should have applied section 3(3) of the Act and found it to be in the interests of justice to admit such evidence. I agree with the Labour Court that in the absence of a foundation having been laid for the admission of hearsay evidence in terms of the Act, the appellant's evidence was properly rejected.

[28] The employees' version had to be weighed against that of the appellant which had been found to be absent. The employees' version could therefore be rejected only if it were found to be improbable. The examples of improbabilities in the evidence of the employees and the one instance of a suggestion of collusion in their evidence do not amount to inherent improbabilities.

[29] It is true that Mulaudzi was evasive about whether he and Mutele witnessed any looting. As to the complaint that the arbitrator used intemperate language that arises from a long exchange between the Commissioner and the appellant's representative regarding confusion about whether the truck was stuck or had stopped because it had lost its cargo and whether reference was to 'looting' or 'stealing' in the passage referred to by the appellant's representative; being exasperated does not mean bias or a denial of the right to present one's case fully. The fact that the arbitrator said that he has 'got the whole day' means that he was prepared to wait until these confusions had been resolved.

[30] The other complaints about the Commissioner's conduct are trivial. When the appellant's representative pointed out that it would be inappropriate for Mutele to remain in the room while Mulaudzi was testifying, the arbitrator readily agreed to that and ordered Mutele to leave the room. His comments about not wanting to give the appellant's representative a heart attack were in this context. The Commissioner had agreed with him.

[31] When the appellant's representative, upon being asked, confirmed that he was going to cross-examine Mulaudzi, the Commissioner said that was what he was afraid of. It was obvious that he meant that he was afraid that futile cross-examination would be engaged in. This is so because the appellant had no version to cross-examine upon after it closed its case based on the newspaper articles constituting hearsay.

[32] The fact that the Commissioner saw no necessity to call Mutele to repeat Mulaudzi's evidence is no indication of bias or irregular conduct. The arbitrator readily accepted the calling of the next witness regardless of his views.

[33] The Labour Court correctly found no bias on the part of the Commissioner. The appellant's contention in respect of reasonable apprehension of bias also has to be based on objective facts. The test for the reasonable apprehension of bias is objective.

Conclusion

[34] I conclude, therefore that the Labour Court correctly held that the arbitration is not reviewable.

[35] In the premises, the following order is made:

Order

1. The appeal is dismissed with no order as to costs.

PP
G. Malindi AJA

Molahlehi DJP and Smith AJA concur.

APPEARANCES:

FOR THE APPELLANT: J. Whyte

instructed by Norton Rose Fulbright South Africa

FOR THE RESPONDENT: M. Makhura of Cheadle Thompson & Haysom
Incorporated.