

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JR1493/07

In the matter between:

SACCAWU obo REBECCA MOLEFE

Applicant

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER TJ SEKHABISA

Second Respondent

SHOPRITE CHECKERS

Third Respondent

JUDGMENT

TIP AJ:

- [1] This is a review application in which the applicant seeks to have an arbitration award set aside, which was made by the second respondent on 30 April 2007. Ms Molefe, the individual applicant, was previously employed by the third respondent (“the company”). She was dismissed on 31 October 2006 and a dispute was referred to the CCMA concerning the fairness of the dismissal. In due course, the matter came before the second respondent who was required to determine whether the dismissal had been substantively and procedurally fair. The arbitrator found in

favour of the company and the dismissal was accordingly upheld.

[2] The incident that gave rise to the dismissal of Ms Molefe took place on 1 September 2006 in the course of strike action which had been undertaken by employees of the company. A picket was in progress at its Roodepoort Checkers store. The case against Ms Molefe is that she carried out an assault against an elderly customer of the store at approximately 08h30 on that day. Four witnesses gave evidence at the arbitration in support of the company's case and their evidence may be summarised as follows:

[2.1] Mrs Wilken is the customer who was allegedly assaulted. She is a regular shopper at the store and was readily able to identify Ms Molefe. According to Mrs Wilken, Ms Molefe was part of a picket outside the store and she started chasing customers and speaking very rudely to them. She then came forward and struck Mrs Wilken on her shoulders. Mrs Wilken is 70 years old and was greatly shocked by this. She had bruising on her shoulders where Ms Molefe had struck her. She received attention at the store for her shock and was given some pills for high blood pressure. She had also been pushed and kicked, although Ms Molefe was not directly implicated in this.

[2.2] The second witness was Ms Hans, an employee of the store, who confirmed that Mrs Wilken had come in when the store opened and that she had clearly been in a state of shock. She noticed that there was some bleeding from Mrs Wilken's foot. She assisted her in relation to her state of shock and stated that she had seen Ms Molefe in front of the store entrance at that time.

[2.3] Ms Gouws also assisted Mrs Wilken, who was clearly in a state of shock and shivering. She gave her some high blood pressure medication.

[2.4] The fourth witness was Ms Serewa, who testified that she had identified Ms Molefe and others as part of a group singing in

front of the door of the store.

[3] The version of Ms Molefe is that she had not been in the vicinity of the store at the time of the alleged incident and, instead, had gone together with a group of striking employees to the Methodist Church in Johannesburg for a meeting of union officials and striking workers. In corroboration of this version, she produced a document identified as an attendance register taken at the meeting. However, it needs to be noted that this register does not show the date or the starting and finishing time of the meeting. Two witnesses gave evidence in support of Ms Molefe's version. The one was Mr Mzila, who testified that he had seen Ms Molefe at the station near the Roodepoort store and that she was part of the group going to the meeting. However, he was unable to state with certainty when the meeting had begun or ended. The second witness was Ms Sibeko who similarly said that she had attended the meeting and that the train had left the station at approximately 08h00. She too was uncertain about the meeting times.

[4] The second respondent reviewed this evidence and was satisfied that the company had discharged the onus of proving a substantive case against Ms Molefe. In doing so he analysed the testimony and it is sufficiently clear from his award why he accepted one version and not the other. He also examined the allegation of procedural unfairness, which consisted of the contention that Ms Molefe's appeal had never been heard by the company. However, as pointed out by the arbitrator, no satisfactory evidence was tendered to establish that an appeal had in fact been lodged. In any event, the arbitrator concluded that the referral of the dispute and the conduct of the arbitration brought before him cured whatever procedural shortcoming there may have been in this regard. In the circumstances, he likewise held that the company had established that the dismissal had been procedurally fair.

[5] The following grounds of review were raised on behalf of the applicant:

[5.1] It is contended in general terms that the arbitrator did not apply

his mind to the relevant issues, that he adopted an unjustifiable approach to the facts, that he failed to properly connect the evidentiary material and legal principles to his award and that he reached a conclusion that was not reasonably justifiable.

[5.2] Those general contentions are grounded on the arguments that the second respondent failed to take into account the attendance register as amounting to proof that Ms Molefe had never been at the store in question on that day, that he should have accepted Ms Molefe's evidence that Mrs Wilken was entirely unknown to her, that he should have accepted evidence that the time of the meeting in Johannesburg was such that Ms Molefe could never have been at the store at the time in question, that he erred in rejecting evidence to that effect and that he erred in finding that Ms Molefe should have disputed the presence of Mrs Wilken at the store on the day.

[6] In the course of the argument before me, Ms Mjeza also argued on behalf of the applicant that there was a credibility issue concerning Ms Serewa, who had acted as a scribe at the disciplinary hearing and then appeared as a witness in the arbitration. It was argued also that Ms Serewa had given conflicting evidence concerning related activities.

[7] I agree that there are some valid criticisms of Ms Serewa's position as a witness and of the fact that the arbitrator had regard at all to the fact that the presence of Mrs Wilken at the store had not been disputed in the course of the evidence for Ms Molefe. Given that her defence was essential one of alibi, that was not an appropriate factor for the arbitrator to take into account. However, those aspects were by no means critical to the principal thrust of the evaluation of the evidence which the arbitrator conducted.

[8] The particular grounds which have been advanced on review arose from the evidential material before the second respondent and which I consider was in general fairly outlined and properly evaluated by him. I am not at

all persuaded that the manner in which he undertook that task could be described as unreasonable or unjustifiable. His conclusions on the evidence and his ultimate award were, in my view, the product of proper consideration and appropriate in relation to the evidence as a whole.

[9] See generally in relation to the test on review the following decisions: *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at para [110]; *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC) at para [97] to [99] and [103]; and see also *Palaborwa Mining Co Ltd v Cheetham & others* [2006] 6 BLLR 553 (LAC).

[10] It is therefore my conclusion that the applicant has failed to establish a good basis for the review and setting aside of the award made by the second respondent.

[11] I accordingly make the following order:

[1] The application is dismissed.

[2] The applicant is ordered to pay the costs of the third respondent.

KS TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 4 February 2010

DATE OF JUDGMENT: 19 March 2010

FOR APPLICANT: Ms M Mjeza
of SACCAWU

FOR THIRD RESPONDENT: Mr X Matyolo
of Perrott Van Niekerk Woodhouse Matyolo Inc