IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 3121/09

In the matter between:

PETER MATOME RASWISWI	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	**1ST Respondent**
TIMOTHY BOYCE *N O*	**2ND Respondent**
PITNEY BOWES SA (PTY) LTD	**3RD Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1] This is an application to set aside an arbitration award issued by the second respondent, a CCMA Commissioner on 2 October 2009. The arbitrator found that the applicant's dismissal on 20 May 2009 was substantively fair, it being common cause that it was procedurally fair. The applicant had been dismissed by the third respondent ('the company') for submitting fraudulent claims for overtime pay and a standby allowance. The applicant was a technician who had been seconded by the company to work for ABSA bank, one of the company's clients.

Grounds of review

2] In his founding affidavit, the applicant cites a number of general grounds of review but failed to give any specific factual details of those grounds, which were necessary for the company to know what case it had to meet and for the court to determine if those grounds have any substance. In the absence of those details these grounds do not bear further consideration. However, other grounds of review were cited in which sufficient factual detail was included to enable them to be addressed.

3] The applicant claims the Commissioner ignored his testimony that he did not commit any fraud in submitting his claims for hours worked and for standby. Secondly, the applicant claims that the Commissioner improperly relied upon a document supposedly issued by the company's client, ABSA bank, without any ABSA employee coming to confirm the contents of that document. The applicant further claimed that in evaluating the charges, the arbitrator failed to look at each element of the charge against him. In particular, the arbitrator failed to consider if he had the intention to misrepresent or mislead the company. In his supplementary affidavit, the applicant raised an additional ground of review, on the basis that the Commissioner committed a gross irregularity by demonstrating bias against him and in favour of the employer during the proceedings. This ground of review was the sole focus of legal argument at the hearing of the review application.

4] The basis of the complaint of bias rests on a number of complaints about how the arbitrator conducted the proceedings. The applicant argued that it was clear from the Commissioner's conduct that he had taken a decision that the applicant had submitted false claims before even hearing his version. In support of this, the applicant cites the following extract from the minutes of the arbitration:

> *"Commissioner: he was given a final warning?*
>
> *Mr Pitsili: final written warning for the same... For submitting false claims for overtime worked.*
>
> *Commissioner: final warning for submitting false claims for overtime worked and this presents chamber 2005.*
>
> *Mr Pitsili: this warning is only valid for a period of 12 months which we did acknowledge.*
>
> *Commissioner: he still has been doing that?"*

5] The applicant also submits that during his examination in chief, when he was explaining how and why he claimed for standby, the Commissioner made it clear he was not prepared to listen to his version and had already taken a decision that the applicant was dishonest. In this regard he cites the following extract from the transcript:

> *"Commissioner: well I think you have been getting away with murder for too long. You are claiming for standby until 22h00?"*

6] The third example given by the applicant concerns the interruption of the applicant's representative in a way that demonstrated, according to the applicant, the arbitrator's bias and his desire to get answers which favoured the employer:

"Ms Ranthako: thank you Sir Commissioner, Mr Raswisi, is it true you submitted claims in respect of hours were not authorised to work for?

Mr Raswisi: No

Commissioner: What did you not submit those claims from page 16 to 19, are they not your claims?

Mr Raswisi: Yes I did.

Commissioner: So you submitted them?

Mr Raswisi: I submitted them.

Commissioner: but they are wrong?" (sic)

7] Regarding the complaints that the arbitrator relied on a document presented by the respondent without calling a bank employee to confirm its contents, the employer argued that the parties had agreed during a pre-arbitration conference on 17 September 2009 that, "*the documents of what they purport to be and the authenticity thereof to be proven on evidence.*" Moreover, the company points out that the authenticity of the documents tabled by it, which it obtained from ABSA, was never disputed by the applicant during the arbitration. The documents in question were the work schedules provided by the bank. Evidence was led that without sight of the schedule a technician would not know when he or she was supposed to be working overtime or on standby.

8] The applicant testified that he had not seen the work schedules before. The applicant's explanation for claiming for overtime worked and time on standby, which was irreconcilable with the work schedules provided by the client, was that he based his hours claimed on what he had been told by a supervisor during 2007 who had advised him what hours he was entitled to claim for.

Because he claims to have been ignorant of the work schedules he could only say that he was unaware that the clients did not want him at work for the hours that he claimed. The arbitrator found the applicants explanation for his excessive claims to be ' absurd', and noted that he did not call the supervisor as a witness in the arbitration hearing.

9] Further, the arbitrator noted that when the supervisor had been called to corroborate the applicant's account during the disciplinary hearing, the supervisor had in fact contradicted the applicant on this key aspect of his defence. The arbitrator clearly did not accept the applicant's claim that he had not seen the work schedules before. Given what the parties agreed in the pre-arbitration process, I am satisfied that there is no merit in this ground of review.

10] The applicant's attack on the Commissioner's analysis of the charge against him is essentially that the Commissioner paid no attention to whether or not he had claimed for the overtime and standby hours with fraudulent intent. Essentially, the applicant is arguing implicitly that if the arbitrator had considered this, he could only have concluded that the applicant had made his claims in the innocent belief that was what he was entitled to. Reading the arbitration award I do not think it is correct that the arbitrator failed to consider the applicant's state of mind. It is sufficient to mention what the arbitrator set out in the penultimate paragraph of his award:

> *"4.5 Having regard to the foregoing, it is perfectly clear that the employee's conduct, on an ongoing basis, constituted gross dishonesty. The employee, who is not a first offender, must have been acutely aware that his claim forms were required to be accurate, and there can be no doubt he was trying to enrich himself by submitting claim forms which she knew were incorrect."*

11] In finding that the employee was guilty of gross dishonesty, the arbitrator effectively found that he submitted his claims for overtime pay and standby allowance with the necessary fraudulent intent. Accordingly, this ground of review must also fail.

12] The ground of review with greater merit concerns the claim of bias. The employer defends the arbitrator's conduct of the proceedings on the basis that he was entitled to intervene in the way he did in terms of section 138 (1), which states:

> "*The Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine a dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities.*"

13] The company submitted that when the commissioner intervened he did so when irrelevant questions were asked, or when the parties were not dealing with the issues that needed to be decided. He stamped his authority on the hearing in compliance with the provisions of section 138 of the LRA. The employer cites certain examples where the Commissioner intervened when it was presenting its case, discussed below.

14] At page 35 of the transcript the following interaction is recorded:

> *"Mr Van der Walt: Yes Mr Commissioner.*
>
> *Commissioner: How many witnesses have you got?*
>
> *Mr Van der Walt: I have got three witnesses Mr Commissioner, Mr Pitsili you will be the company representative, you will give us a short background and then to technical witnesses in respect of overtime and standby hours that had to be and not claimed.*
>
> *Commissioner: What do you mean a short background?*

Mr Van der Walt: Mr Pitsili will just indicate to us why is it necessary to work overtime, etc etc just a brief summary.

Commissioner: I don't want to write a book of this, he's either guilty of figures he knows were incorrect or he is not.

Mr Van der Walt: Yes

Commissioner: Anyone knows how to tell the truth, that it is dishonest to put incorrect figures."

15] Another example from page 58 of the transcript, cited by the company as evidence that the arbitrator had not made up his mind before the applicant testified reads:

"Mr Van der Walt: Yes Mr Commissioner, Mr Pitsili if you can turn to page 79 can you identify the document for us.

Mr Pitsili: Mr Chairman, page 79, is a formal disciplinary hearing that was held against PR, on 29th of September 2005.

Commissioner: 2009? (sic)

Mr Pitsili: Yes.

Commissioner: He was given a final warning?

Mr Pitsili: A final written warning for the same... for submitting false claims for overtime work."

16] I agree with the company that the arbitrator did intervene on a regular basis when the employer was presenting its evidence in chief. Almost all of his questions to the employer's witnesses were directed at obtaining clarity about the employer's evidence supporting the charges against the applicant. There is nothing wrong with asking questions to obtain greater clarity. The object of those questions was to put the employer's case into clear focus: they did not challenge the employer's case.

17] The same cannot be said of the arbitrator's interventions when the applicant's evidence was presented. The following extract beginning at page 40 of the transcript, at the beginning of the applicant's evidence in chief illustrates this point.

> *"Ms Ranthako: Thank you Sir Commissioner, Mr Raswisi, is it true that you submitted claims in respect of hours that you are not authorised to work for?*
>
> *Mr Raswisi: No.*
>
> *Commissioner: What did you not submit these claims from page 16 to 19, are they not your claims?*
>
> *Mr Raswisi: Yes I did.*
>
> *Commissioner: So you submitted them?*
>
> *Mr Raswisi: I submitted them.*
>
> *Commissioner: But they are wrong?*
>
> *Mr Raswisi: They are not wrong.*
>
> *Commissioner: The client didn't require these hours to be worked. So you submitted the claims for overtime and standby electronically,*

pages 16 to 19 and you say they are not wrong?

Mr Raswisi: They are not wrong.

Commissioner: Okay let me ask you this... Have a look at page 20, on 22 February... Where is that.. Where is his claim for 22 February.

Ms Ranthako: It is on page 19.

Commissioner: Page 19, on 22 February you claimed overtime from 0800 hours to 15:00 hours?

Mr Raswisi: Yes.

Commissioner: Page 23 that is a Sunday?

Mr Raswisi: Yes.

Commissioner: Where does it show that they required any overtime? Week 3, the Saturday and Sunday; page 23 shows that Absa did not require any overtime on Sunday, 22 February 2009. How can you claim correctly?

Mr Raswisi: Okay Mr Chairman, first thing, these papers that the employer is saying was submitted by the customer, I only got one page that was from Maurice Hau, the guy who was here, it was only one sheet.

Commissioner: Mr Raswisi, the customer and so didn't require any overtime technician that Sunday and yet you claimed for 7 hours, that didn't require any overtime."

(sic)

18] This line of questioning directed by the Commissioner continues in the same vein, with the applicant's union representative scarcely getting a word in. Apart from the fact that the applicant's representative had only asked one question before the arbitrator launched into his own line of cross examination, it is clear that the character of his questions to the applicant was very different to the character of the questions he asked the company witnesses. The entire thrust of his questioning was not aimed at elucidating or clarifying the applicant's defence, but at challenging it. Moreover, the arbitrator's questions to the applicant did not follow naturally from an incomplete line of cross examination initiated by the employer: the arbitrator took the initiative by directly attacking the applicant's defence, while he was still giving evidence in chief.

The legal concept of bias

19] In the *BTR Sarmcol* case, the Appellate Division, as it then was, considered the test of bias in the context of when an industrial court judge should recuse himself or herself. The court found that the existence of a reasonable suspicion of bias satisfied the test for recusal.[1] The test was further tightened up by the decision of the Constitutional Court in the *Sarfu* [2] case and elucidated by it in

1***BTR Industries SA (Pty) Ltd & others v Metal & Allied Workers Union & another* (1992) 13 *ILJ* 803 (A)**, per Hoexter JA: "For the reasons which follow I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias.

In my opinion the statement in the full court judgment) [in *Mönnig & others v Council of Review & others* 1989 (4) SA 866 (C)] (at 879A-B) that-

'provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker',

fairly reflects the recent trend in South African judicial thought, and I would approve it."

2 The court held at 177, par [48]: "*It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."* The learned judges went on to expound that the reasonableness of the apprehension must be assessed against various qualities expected of judges.

the *Saccawu*[3] case. Without, I hope, detracting from the nuanced reasoning expressing in those judgments, a major theme in the Constitutional Court's refinement of the test was to emphasise that not only must the apprehension of bias be that of a reasonable person in the position of the person being judged who has an objective factual basis for their suspicion, but the apprehension of bias they have must be one that in law would be recognized as a raising a legitimate concern about the adjudicator's impartiality.

20] In this instance, having regard to the transcript, I am satisfied that there are enough examples to indicate that the manner in which the arbitrator approached the witnesses would create a justifiable impression that he had a predisposition to assist the employer in putting its case and to challenge the applicant's case. A reasonable person in the position of the applicant would have had a strong factual basis for drawing this inference, and therefore for having a reasonable apprehension of bias.[4] The question that remains is whether the degree of license which arbitrators are allowed in conducting proceedings in an inquisitorial manner might nevertheless mean that such an apprehension of bias should not be recognized as legitimate.

---

3 ***South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC)**, per Cameron, AJ at 714-5:

"[14] The Court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable.

This two-fold aspect finds reflection also in S v Roberts, decided shortly after Sarfu , where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.

[15] It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance.

[16] The 'double' unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged."

4 See in this regard ***Mutual & Federal Insurance Co Ltd v CCMA & others* [1997] 12 BLLR 1610 (LC)** at 1618H-1619C, where the learned judge Jali AJ, emphasized that the conduct of a commissioner may be a basis for inferring bias.

21] It is well established that arbitrators performing statutory arbitration under the LRA are entitled under the provisions of section 138(1), to adopt an inquisitorial approach to the conduct of proceedings and are not confined to the adversarial practices of the magistrate and high courts.[5] In the words of the learned Stelzner AJ:

> *"The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter Administrative Law at 536.) These principles have been reinforced by the constitutional imperatives regarding fair administrative action. (See Carephone (Pty) Ltd v Marcus NO (1998) 19 ILJ 1425 (LAC) at 1431I-1432A.) The core requirements of natural justice are the need to hear both sides (audi alteram partem) and the impartiality of the decision maker (nemo iudex in sua causa). (See Baxter at 536.)*
>
> *[8] It follows from the above principles that a commissioner must conduct the proceedings before him in a fair, consistent and even-handed manner. This means that he must not assist, or be seen to assist, one party to the detriment of the other. Therefore, even though a commissioner has the power to conduct arbitration proceedings in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly under the provisions of s 138(1) of the Act, this does not give him the power to depart from the principles of natural justice. Thus, further, although it clearly lies within the commissioner's powers to decide whether to adopt an inquisitorial or adversarial mode of fact finding, once this decision has been made it ought to be consistently applied to both parties.*
>
> *[9] In Brassey et al Commentary on the Labour Relations Act at*

5 See for example, ***Consolidated Wire Industries (Pty) Ltd v CCMA & others*** (1999) 20 ILJ 2602 (LC), cited with approval in ***Klaasen v CCCMA & others*** **(2005) 26 *ILJ* 1447 (LC)** at 1455, par [27]; ***Armstrong v Tee & others*** **(1999) 20 *ILJ* 2568 (LC)** at 2538, par [33], and the cases of *Theron NO* and *Mutual & Federal Insurance Company* cited elsewhere in this judgment.

A7:49 the following guidance with regard to the choice between forms of procedure is provided:

'In adversarial proceedings the litigation process is in the control of the parties; the evidence that is adduced is that which the parties choose to present and the arbitrator operates rather like an umpire. In inquisitorial proceedings the arbitrator plays a more active role in the hearing, calling witnesses and interrogating them in order to ascertain the truth. . . . Where an arbitrator adopts an inquisitorial approach to the arbitration, she cannot abandon the well established rules of natural justice; on the contrary, she must be especially careful to guard against creating a suspicion of bias in the breasts of litigants who will have little, if any, experience of a process so foreign to our system of adjudication. See Mutual & Federal Insurance Co Ltd v CCMA & others [1997] 12 BLLR 1610 (LC) at 1619-20.'

[10] Where a commissioner has adopted an adversarial approach, he or she should stand entirely away from inquisitorial style questioning of witnesses, leaving the parties to adduce and test evidence as they see fit, alternatively, <u>if he or she wishes to descend into the arena, this should be done in a consistent manner</u> so as to avoid giving rise to suspicion of bias."[6]

(emphasis added)

22] The emphasized portion of the extract above is particularly pertinent in this matter. Both parties were represented in the hearing and the arbitration was conducted within the broad framework of adversarial proceedings. That is not to say that the arbitrator could not adopt an inquisitorial approach in the interest of expedition or fairness, but when intervening the arbitrator's approach must be consistent.

23] In this case the arbitrator's approach was far from even handed and there is more than an adequate basis for believing the arbitration was not conducted in

6 ***County Fair Foods (Pty) Ltd v Theron NO & others* (2000) 21 *ILJ* 2649 (LC)** at 2652-3

an impartial manner, giving rise to a reasonable apprehension that he was more disposed to the employer than the employee. Consequently, the arbitrator committed misconduct in relation to his duties by depriving the applicant of a fair hearing.

24] Because the arbitrator’s intervention affected the fairness of the process and also the evidence that was adduced, this is not a case in which the court should substitute its own decision for that of the arbitrator.

25] Apart from the most blatant pre-judgmental comment of the arbitrator cited in paragraph [5] above, I believe that the evidence of bias should have been fairly obvious from the record, and therefore the review application should not have been opposed on this ground. Accordingly, it is fair and equitable that the applicant should be paid the costs of the application.

Order

26] The arbitration award issued by the second respondent under first respondent’s case number GAJB 19848/09 dated 02 October 2009, is reviewed and set aside.

27] The matter is remitted back to the first respondent to be set down before a commissioner other than the second respondent for rehearing of the arbitration.

28] The third respondent is to pay the applicant’s costs.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing: 21 October 2011
Date of judgment: 22 March 2011

Appearances:

For the applicant: S Mabaso of Mabaso Attorneys

For the respondent: J C v.d. Walt instructed by L Dekker Attorneys