IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No: JR1524/06

In the matter between:

LEGASA ANDRIES MOSHELA	**Applicant**
AND	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1st Respondent**
LANCE CILLIERS	**2nd Respondent**
DHL DANZAS AEISA (PTY) LTD	**3rd Respondent**

JUDGMENT

CAWE AJ

INTRODUCTION

1] This is an application which is opposed by the Third Respondent, DHL Danzas AEISA, for an order reviewing and setting aside and/or correcting the award by the Second Respondent under Case Number: GAJB 14681-05 dated 17 May 2006. The Applicant wants the Third respondent's award to be substituted by an order that Applicant's dismissal was substantively unfair. Further the Applicant seeks compensation for twelve (12) months and to be reinstated without any loss of benefits. In the alternative the Applicant seeks to have the matter remitted back to the Second Respondent to be heard afresh before another Commissioner other than the Third Respondent.

2] The instant application is one of those that have, unfortunately, had a protracted history before this Court. The matter has served before Judges Cele AJ (as he then was) and De Swart AJ. The first instance was when the Applicant referred the matter to the Court for Review.

3] On 7 May 2008 Cele AJ (as he then was) dismissed the Applicant's application for the review of the arbitration award made by Third Respondent. On 16 July 2009 the Applicant's application for the rescission of the aforesaid Order came before Judge Du Swart. In a judgment delivered on the same day the application for rescission was granted, the Order previously made was rescinded and the Applicant was given leave to amplify the grounds upon which the review of the arbitration award was sought.

4] The Third Respondent appealed against this decision citing amongst others that the application for rescission had been on Notice Of Motion and did not follow the decision in **Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984(3) SA 623(A).**

5] In granting leave to appeal to the Applicant Judge Du Swart stated that;

> "*In my view a grave injustice would result if the doors of this Court were to be closed to the applicant in circumstances where he was unaware of the fact that his application for review was on the roll for hearing before this Court. It does not appear to me that there is a reasonable prospect that another court will come to a different conclusion in this regard, given the circumstances of the case.*"

6] She then refused leave to appeal. This was what has led to the review application being re-enrolled to serve before me.

Relevant Background Facts

7] The Applicant was employed as an export controller by the Third Respondent. His duties were to prepare documentation for the export of Client's goods.

8] In February 2005 the Applicant oversaw the completion of documentation for a shipment to be exported to Hong Kong for a client of the Third Respondent called Digistix.

9] According to the Third Respondent the Airfreight Export Manager of the Third Respondent became suspicious of this shipment for a number of reasons. One of these reasons was the fact that the Applicant had allegedly manually changed the credit account of Digistix to a cash account. The Applicant arranged for the shipment to be transported to Hong Kong with Emirates Airline as opposed to it being sent directly to the Third Respondent's officers in Hong Kong. It is not specified by the Third Respondent as to which airline regularly deals with its shipments.

10]When the matter file was located, according to the Third Respondent, the contacts there were not Digistix Employees. This aroused the suspicion of the Export Manager even further. One of the reasons that made the Export Manager investigate was the fact that the Applicant worked on a Saturday and seemed to have calculated the weight and cost of the shipment before it had reached the warehouse. This was against the Rules of the Third Respondent.

11] Acting on his suspicion the Export Manager ordered that the shipment be located and brought back to South Africa. The Transport Manager of the Third Respondent fetched the shipment from the airport and while returning to the Third Respondent's offices he was stopped by the South African Police Force. The shipment was opened and it was found to contain an illegal consignment of perlemoen.

12]According to the Applicant he was approached by the Director of the Third Respondent; Mr Brian Olwage, who informed him verbally of his suspension. The reason for the suspension had something to do with a shipment that the Applicant had handled. He was then issued with a notice of suspension on the same day (8th March 2005).

13]At a disciplinary hearing conducted on the 11th March 2005 the Applicant was charged with gross dishonesty, not following company policy and procedures and bringing the company's name into disrepute. He was found guilty and dismissed.

14]The Applicant then referred the dismissal to the CCMA. The Second Respondent found in favour of the Third Respondent. Not only did the Second Respondent find in favour of the Third Respondent but he also found that the referral was frivolous and vexatious in the extreme. In view of this finding he ordered costs against the Applicant in favour of the Third Respondent on an attorney and own client scale.

15]The review application is brought in light of the Second Respondent's adverse finding against the Applicant.

GROUNDS FOR REVIEW

16]The Applicant cites the fact that the Second Respondent refused him a postponement when he requested same in view of the fact that Mr Nkosi, who had been his representative on the first day of the arbitration, had not formally withdrawn from the matter. This made it impossible for Mr Van Tonder, the Applicant's new representative, to proceed with the matter on the relevant date.

17]The Second Respondent refused the postponement application outright stating that if Mr Nkosi insists on it he would award double costs against the Applicant and would bar him from having his case heard until such costs were paid in full.

18]It is clear from the transcribed record that the Second Respondent made the following statement which appears on page 124 of the record to persuade/ force the applicant to proceed with the arbitration unassisted:"*…in terms of the CCMA rules if the parties agree to postpone all they've got to do is notify the CCMA seven days in advance and the CCMA must postpone, it doesn't have a choice. No effort was [made] contact the CCMA, no effort was made to contact the respondent about the possible postponement for today. The CCMA has incurred cost by brining me in today, I don't do this for nothing, I get paid a fee. The respondent has incurred cost by being here today and those costs will be wasted if we do postpone. I would like you to caucus with Mr. Nkosi and I am putting two options on the table- if you insist on a postponement then I will tender costs against you and I will tender double costs-The costs will be for the respondent's waste of time for today and the costs will be for the CCMA's wasted time today okay. And Mr. Nkosi will give you an indication of what that would amount to in rands and I would require for those costs to be paid before this matter gets set down again* *and it will be set down unilaterally by the CCMA. So they will only set a time once you can proof (sic) that costs have been tendered. Okay that is one option. The second option Mr. Nkosi is still your attorney on record, proceed with him today as scheduled okay and hand over to Van Tonder if we go on to a third day. The third option is dismiss or excuse Mr. Nkosi today and proceed unrepresented. Okay those are your three options. Would you like to take a caucus with your representative and consider the options?".*

19]The Applicant chose to proceed unrepresented.

20]One has to deal with the matter of the refusal of postponement objectively. The most important test that the Court is called upon to apply is whether any party will suffer prejudice if postponement is granted or refused. One has to look at how the Constitutional Court has dealt with the matter on various occasions. One that readily comes to mind is that of **National Police Service Union and others v Minister of Safety and Security and Others 2000(4) SA 1110(CC)** at 1112F-H, where the Court enunciated the principles governing the granting or refusal of a postponement as follows:

> "*The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interest of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application.*

Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this a Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed."

21]In the case cited above the legal representative of the Applicant was not ready to proceed and the other party had no problem with the postponement being granted. The Court took the view that the agreement of the parties to postpone does not do away with the Court's discretion whether to grant such postponement or not.

22]In the instant case the Applicant knew two weeks before the arbitration that he intended to "dismiss" Mr. Nkosi's as his attorney of record and instruct Mr. Van Tonder to take over. At the time he was legally represented by Mr. Nkosi at the arbitration and Mr Van Tonder in the criminal case. He can not, then, rely on the fact that he is a lay person and could not have known that applications to the CCMA for postponement are done at least seven days before the date of process. He had the benefit of two legal representatives who could have advised him correctly.

23]When the Applicant was faced with opposition from the Respondent's attorneys and the fact that they wanted him to tender wasted costs if he persistedt with the postponement application, he decided to proceed unrepresented. The Applicant's Heads of Argument do not show what prejudice was caused to the Applicant by the refusal of the postponement by the arbitrator. None was argued in open Court. I, therefore, do not find that the Commissioner's conduct is reviewable on the ground of not allowing the Applicant postponement.

24]Another ground for review that was raised by the Applicant was that the Commissioner had assisted in leading the testimony of the Third Respondent's main witness whereas the Third Respondent was legally represented throughout the Arbitration. The Applicant's Heads refer to pages 2 and 28 of the transcribed record to enhance its allegation that the Commissioner assisted the Third Respondent's main witness during his testimony. I tend to agree with the Third Respondent's counsel regarding this issue, when he submits that the Commissioner was not leading evidence for the witness but was merely taking an inquisitorial approach. I have perused the record and find no evidence of the Commissioner assisting the witness in his evidence. I, therefore, find that this is not a ground for me to interfere with the Commissioner's award.

25]The Third ground for review, submitted by the Applicant is that the Commissioner failed to apply his mind to the fact that the Applicant had only sent two boxes for shipment whereas in the end 30 boxes were returned from Dubai. These formed the basis of the charges against the Applicant.

26]This ground for review goes to the very core of the Commissioner's award. The Respondent's stated its case first, at the arbitration, as it had the onus of proving that the Applicant's dismissal was fair. It opened its case by calling several witnesses. The first witness to be called was Mr S Adams, Airfreight Export Manager, the second was Mr K. Day, Air Transport and Warehouse Manager (Mr. Day was also responsible for security) Mr I. Molepo, a warehouse worker and Mr C.Cooper, Airfreight Expert Supervisor and Applicant's erstwhile supervisor.

27]I shall deal with their testimony (collectively) as has been done by the Commissioner in his award. Their testimony is summarised as follows;

"*12.1)Digistics(Pty)Ltd is a new account-holding client that only exported sample perishable foodstuffs to Hong Kong with each consignment weighing between 15 and 50kg. Adam always and only dealt with them- each employee had a regular group of clients with whom they exclusively dealt;*

12.2) The applicant accepted a consignment for Hong Kong and used the name of this Digistics client as the shipper. The consignment weighed 720kg and the R14 320 cost was paid for in cash;

12.3) Apart from numerous grossly irregular administrative issues the applicant ought to have referred the order to Adams, or at least informed him about it later if Adam was unavailable which was the situation on that day. The applicant also ought to have booked the consignment on account and should have been alerted when the shipper insisted on paying cash, which is unusual. The consignment was sent via Dubai instead of direct to Hong Kong, and was destined for an address in Hong Kong instead of to respondent's Hong

Kong office, which is a standing instruction that can only be reversed by respondent's managing director. The applicant had personally dealt with the physical cargo on a Saturday, which is a standing instruction that can only be reversed by respondent's managing director. The applicant had personally dealt with the physical cargo on a Saturday, which in itself is unusual. The applicant was experienced enough, if the consignment was genuine, for any or all of these and other irregularities to have brought the consignment to the attention of, at least, Cooper;

12.4) *Adams called for the file on the Monday after the consignment was despatched to the airline. The applicant failed to hand over the file, which was eventually retrieved by Cooper. Further investigation by Adams revealed sufficient severe anomalies for Adams to alert the customs officials – in conjunction with them the consignment was returned to JIA from Dubai whilst in transit. On its arrival, several SAPS officers supervised the offloading of the consignment. The packages were opened and fresh perlemoen was found inside. Digistics had been contacted and had no knowledge of the consignment or the persons purporting to be Digistics employees;*

12.5) *Different documentation completed by the applicant referred to the goods either as 'traditional foodstuff', "frozen vegetables" or "spices". There was no reference to "perlemoen" on any documentation, and it* *is illegal to handle perlemoen, without the necessary licence. No such licence has been produced. Cooper's signing of the file was merely to acknowledge that a COD order was placed and paid for- he did not and was not required to scrutinise the paperwork or any other element of the consignment;*

28]The Applicant's version can be summarized (as was done by the Commissioner) as follows;

"*13.1) The applicant had received a telephonic request for goods to be urgently air freighted to Hong Kong. The client presented himself as an employee of Digistics, and the applicant was not aware that this client was exclusively Adam's;*

13.2) Preliminary paperwork was done, was more fully completed on the client and goods' arrival. The client's request that the goods bypass respondent's Hong Kong office was granted after the applicant consulted with Cooper;

13.3) Documentation had been rushed through because of the urgency and errors were made. Often errors are attended to after the goods have left, and these would have been addressed had Adams not kept the file. The applicant had not deliberately retained the file after Adams called for it, but had to retrieve it from the official who was closing the file;

13.4 The applicant had at all times acted in good faith towards the client and had provided a professional service to favour the client when deviations from the norm were required- none of these deviations were prejudicial or detrimental to the respondent or the integrity of SARS or customs' security and other lawful processes;

13.5 The client had insisted on paying cash, which is unusual. The applicant denies being at the warehouse on the Saturday to receive and facilitate the shipping of the goods.

13.6 The applicant has only erred in completing documents in a proper manner which would justify nominal disciplinary action short of dismissal;

13.7 The applicant denies that the cargo contained perlemoen- it was never shown to him. It is further not normal or required to examine the contents of client's sealed packages and respondent accepts the nature of good as disclosed by clients;

13.8 The minutes of the dismissal hearing are inaccurate and fail to capture important issues raised by the applicant. These minutes ought to be ignored;

29] After the Applicant's dismissal the Respondent preferred criminal charges against him. Applicant was acquitted on both counts at the Criminal trial (Case Number: 2SH160/05). The Court made the observation that Mr Adams, of the Respondent, became suspicious for a Number of reasons including the fact that the Applicant (the accused at the criminal trial) worked on a Saturday and took a cash payment whereas Digistix and the Respondent had a thirty day account arrangement. The court went on further to observe this, on pages 106-107 of the judgement;

> "*Well the evidence which we heard from the various witnesses is that it is against the company policy for the accused and all those working at the Airport to know of the contents of the specific package shipped. In fact it is said that you had to rely on the information as supplied to you by the client….*
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> *In my view the state must prove that the accused knew what was contained in the two boxes which were hipped to Dubai and that he falsely wrote that it is frozen vegetables when actually do(sic) when there is illegal goods inside the two boxes. Well taking in into account that the accused was not allowed to have a look of the contents of the two boxes it will be very much difficult to hold that the accused knew what was inside the two boxes shipped to Hong Kong via Dubai.*
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> *So on that basis I have to agree with the defence that there cannot be said that there is a prima facie case against the accused. There are quite a number of other grounds upon which I may have to agree with the defence but I think that one it is a main one I which I wish to base my decision on. Well on the second count the state apparently is agreeing that its case against the accused on the second count it is not strong. In this matter two boxes, two large boxes were shipped to Hong Kong via Dubai.*

When suspicions arose there was an order that the two boxes must be returned back to Johannesburg International. 30 boxes were received at the Johannesburg International Airport. Well there is no link between the two boxes that was shipped in the first place to Hong Kong via Dubai and the boxes that were later returned to Johannesburg. It has also not been proved that the contents of the two boxes that went to Dubai contained Abalone and that they were the same boxes that came back to South Africa.

So for these reasons I am of the opinion that the accused must be discharged on both accounts and the order I make is that on both counts the accused is not found guilty **NOT GUILTY DISCHARGED.**

30]In his award the Commissioner on page 7 states that;

"19) I found the minutes of the internal hearing to be, on the balance of probabilities, authentic and consistent with the witnesses' testimony. The applicant's bland denial of certain significant parts, including that it was never put to Cooper that Cooper authorised the consignment, was unconvincing;

20) The applicant has denied that the cargo was perlemoen. His denial is based on the fact that the cargo was never shown to him. I accept that he has no direct knowledge of the cargo. However, Adam testified without rebuttal that no *queries were ever raised by any person pertaining to the non-arrival of the consignment at the Hong Kong address. That it was an illegal cargo is probable, and I have no reason to disbelieve respondent's testimony on the actual content;*

21) In spite of my prompting, no explanation was offered by the applicant why respondent's witnesses would fabricate their testimony which led to applicant's dismissal to the extent of applicant actually being dismissed and with a criminal case pending- it is logical and probable that the same witnesses will testify to the same issues in court;

22) Proof of misconduct frequently has to be proved by the drawing of inference from proved facts, as opposed to, say, mere speculation. In the Appellate Division matter in ***AA Ondelinge Assuransie Bpk v***

De Beer(1982); *it was found that "...something will be proved in circumstantial evidence when (1) The inference to be drawn is consistent with all the facts proved, and (2) The inference to be drawn is the most plausible inference.." Circumstantial evidence therefore amounts to proof of guilt as inferred from a chain of proved circumstances, and the selected inference must, by the balancing of probabilities, be the more natural or plausible conclusion from two or more conceivable ones.*

23) The applicant was charged with and dismissed for fraudulent completion of documents, failure to follow due processing the completion of the documents, and bringing the respondent's name into disrepute with customs(sic). The preponderance of evidence and testimony before me causes me to find, on the balance of probabilities, that he respondent has proven its case in that the

> *applicant committed gross misconduct;*
>
> *24) I have been persuaded that the applicant's actions had rendered a continued employment relationship intolerable and that dismissal was appropriate."*

31]One has to compare the findings of the Criminal Court and the findings of the Commissioner. It should be borne in mind that the criminal case was still pending when the Commissioner made his decision. The two decisions therefore, had no impact on each other. They were made independently of each other. Moreover, the standard in criminal cases is higher than applied at arbitration. Guilt in criminal cases is "*beyond reasonable doubt*" and at arbitration it is "*on a balance of probabilities"* test.

32]I can not find the reasoning of the Commissioner to have been misled. He worked with the evidence before him and came to a reasonable conclusion. I cannot substitute my knowledge of the outcome of the criminal case on the Commissioner. His award is well reasoned.

33]The test for review as set out in **Sidumo and others v Rustenburg Platinum Mines &others (2007) 12 BLLR 1097(CC)** is whether the decision arrived at by the Commissioner is one that no other decision maker would not have arrived at. The Commissioner has considered all the facts and circumstances in his analysis of the parties' evidence and argument. The Commissioner's award does meet the standard of reasonableness that is required in review applications.

34]In **Sidumo(*supra)*** it was stated that;

> "*To sum up in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair.*"

35]I find that the Commissioner did understand the issues before him and made a reasonable decision and found, appropriately, in favour of the Respondent.

36]Applying the "*balance of probabilities"* test to the circumstances of the case before him the Commissioner found that there were anomalies regarding the behaviour of the Applicant in relation to the transactions that resulted in his dismissal. This, he found, was sufficient to uphold the dismissal of the Applicant. Although the Applicant does seek to rely on the fact that he was acquitted of the charges against him by the Criminal Court, it is my view that the acquittal was based on a standard that is not applicable at arbitration. The arbitration, moreover, preceded the criminal case.

37]On this ground for review, as set out in the applicant in his application, I cannot find any reasons for review or interfere with the award.

38]The last ground for review as set out in the Applicant's Heads of Argument and Applicant's Founding affidavit is that the Second Respondent committed a reviewable misconduct by awarding costs on an attorney and own client scale against me for what he referred to as a frivolous and vexatious referral without any basis of bad faith on my part in referring the dispute in question.

39]This is the only part of the Commissioner's award that I have a problem with. The Commissioner in his award, at paragraph 25,3, concludes thus;

> *"I herewith award costs against the application in favour of the respondent on an attorney/client Magistrate-court scale for the two days of the arbitration and payable within four weeks of the applicant receiving this award.*

40]Section 138(10) of the Labour Relations Act provides as follows;

> 10) *The commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the Commission in terms of section 115(2A) (j) and having regard to-*
>
> *a) any relevant Code of Good Practice issued by NEDLAC in terms of section 203;*
>
> *b) any relevant guideline issued by the Commission.*
>
> *[Sub-s. (10) substituted by s: 27(b) of Act 12 of 2002.]*

41]There is nothing in the Applicant's referral that suggests that he did not believe that he had been unfairly dismissed. He actually testified that he could not be held responsible or liable for the cargo that was returned from Dubai as he had not been allowed to see its contents. This alone made him convinced that he stood a chance of being exonerated at arbitration. His was not an entirely "lost case".

42]Much as most parts of the Commissioner's award is reasonable the cost order leaves much to be desired. There is no justification for what the Commissioner sets out save to say that "*there was overwhelming evidence against the Applicant*". The question to be asked is whether this makes the referral vexatious. In my view it does not.

43]An attorney and client cost order opposing entitles the party in whose favour it is made to recover more from the party than he or she would be able to recover on a party and party scale. Clearly this means that such costs are punitive. This approach is reserved for exceptional circumstances as was held in **Reid v Royal Insurance Co Ltd 1951(1) SA 713(T).**

44]The approach of the courts in recent years are in favour of the principle that persons should not be deterred from enforcing their rights because they fear that they will have to pay their opponent's costs as well as their own if they do not succeed. In **Hlatshwayo and other v Hein 1998(1) BCLR 123 (LCC)** the Land Claims held that:

> "*it does not regard itself as bound to follow the usual approach of the superior courts in awarding costs and that it will give due weight to the constitutional obligation to promote the fundamental right to access to the courts in such a was that legitimate litigants will not be deterred from approaching the court to have disputes settled for fear of an adverse costs order.*"

45]In the instant case there was no proof of frivolity or vexatiousness on the part of the Applicant. The only correct conclusion to be drawn is that the Commissioner misdirected himself in his award of attorney and client costs. The principle in the Hlatshwayo case *(supra)* is applicable in the instant case. The doors of the CCMA should not be closed to the public out of the public's fear that they might end up with a costs order granted against them.

46]For the aforestated reasons the costs order against the application stands to be reviewed and set aside.

47]For the aforegoing reasons I make the following order:

1. Paragraphs 25.1 and 25.2 of the Commissioner's award are upheld.
2. Paragraph 25.3 of the Commissioner's award is reviewed

and set aside. It is substituted by the following:

"*No order as to costs is made.*"

3. I make no order as to costs.

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N. CAWE
Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Adv. P M W Botha (Pro Bono)
Instructed by SDV Attorneys

For the Respondent: **A.** J. Posthuma
Instructed by Snyman Attorneys

Date of hearing: **27 May 2011**

Date of Judgement: **01 July 2011**