



Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

CASE NO: JR 1621/09

In the matter between:

AMBRO SALES

Applicant

and

METAL ENGINEERING INDUSTRIES

First Respondent

BARGAINING COUNCIL

SIPHO DLAMINI N.O.

Second Respondent

**NATIONAL UNION OF
METALWORKERS OF SOUTH
AFRICA OBO MOSES GAMA**

Third Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

- [1] The third respondent in this matter has applied for leave to appeal against the judgment handed down in terms of which I held that the arbitrator's finding

that the third respondent's dismissal by the applicant was substantively unfair should be set aside and substituted with a finding that his dismissal was substantively fair.

- [2] In my judgement, I found that the arbitrator failed to consider the credibility of the third respondent in circumstances where at the time he was questioned about the overtime due to him, he never suggested that he had cleared it with his supervisor, but only advanced this defence belatedly in the arbitration proceedings. I also found that in the absence of an explanation for the belated advancement of this defence, no reasonable arbitrator would have accepted it as credible, and that a conclusion that the third respondent had not acted dishonestly in relation to his overtime entitlement was an untenable conclusion.
- [3] In summary, the third respondent claims that I erred by concluding that his evidence was contradictory because he only raised his critical defence at the arbitration and that this required the arbitrator to make a credibility finding against him. He also claims that I erred in finding him guilty on the first charge of making a misrepresentation in relation to his overtime claim.
- [4] In support of the first ground, the third respondent suggests that because the hearing before an arbitrator is a *de novo* one, he was entitled to advance a defence not previously advanced. It is true that a party may advance new evidence at the arbitration hearing not previously relied upon in earlier disciplinary proceedings. However, when the new evidence is evidence that must have been known to that party at the time of the initial proceedings and particularly where it is, as in this instance, evidence that is fundamental to that party's case then the credibility of that evidence naturally arises for consideration. The reason for this ought to be obvious: if a party knew of that critical evidence at the time of the original proceedings, then why did that party not raise it then? The third respondent never explained why this defence was introduced at such a late stage and in any event it conflicted with his other defence that he did not need permission to spend time at the bank because he was doing it during his lunch hour.

- [5] In relation to the second ground, there was no evidence to suggest that the third respondent did not think he would be paid for overtime work between 14H00 and 16H47 on the afternoon in question in circumstances in which he knew he was not entitled to payment for all that period. It was suggested that it was the duty of the employer to have called the third respondent's supervisor to rebut his belated defence that he had obtained permission to do his banking during the afternoon. If that had been the third respondent's defence from the inception of disciplinary proceedings against him, there may have been some merit in such an argument, but given the fact that this defence was belatedly raised and given that the third respondent himself did not make any effort to call his supervisor to corroborate his version, the arbitrator had to consider the merits of the third respondent's defence on the evidence before him. The essential characteristics of the evidence in support of his version was that it was an obvious version for which no credible explanation was advanced for its late introduction, which was also uncorroborated and in conflict with his alternative defence. Given that, there was more than sufficient basis to conclude that the defence should be rejected, even in the absence of the employer calling a witness in rebuttal.
- [6] In light of the above, I am not persuaded that there is a reasonable possibility that another court might come to a different conclusion and the application for leave to appeal ought to be dismissed.

Order

- [7] The application for leave to appeal is dismissed.
- [8] No order is made as to costs.



R LAGRANGE, J
Judge of the Labour Court
(In chambers) 30 November 2015