



Not reportable

## THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

### JUDGMENT

Case no: JR 2467/10

In the matter between:

**SACCAWU obo SIMON TSOKU**

**First Applicant**

and

**COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

**First Respondent**

**P KEKANA N.O.**

**Second Respondent**

**METCASH TRADING AFRICA (PTY)  
LTD**

**Third Respondent**

**BSC TECHNOLOGIES (PTY) LTD T/A  
STAX FOURWAYS**

**Fourth Respondent**

**Heard:** 22 October 2015

**Delivered:** 26 January 2016

**Summary:** (Review – employee found not guilty – reinstatement not ordered – conclusion not unreasonable on the evidence before the arbitrator, despite his findings on the charges)

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### JUDGMENT

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LAGRANGE J

## Introduction

- [1] This is a review of an arbitration award in which the arbitrator found that Mr S Tsoku's ('the applicant ') dismissal was procedurally fair but substantively unfair and awarded him eight months' remuneration as compensation. The applicant believes he should have been reinstated. Although the employer did not agree with the arbitrator's finding that he was not guilty of the charges against him, the employer did not attempt to set aside these findings by launching a cross review.
- [2] The original employer was the third respondent, but the business in which the applicant worked was subsequently sold to the fourth respondent. The fourth respondent did not oppose the review application, but the third respondent did.
- [3] The applicant was originally dismissed on 22 February 2007 after being found guilty on the following charges:
- "1. Victimisation in that 1 February 2000 and 7U victimised and harassed the female employees in front of customers and staff.
- And/or
2. Incompatibility in that you are failing to work in harmony with fellow employees and to act in line with the culture of the organisation.
- And/or
3. Insolence in that you acted offensively, contemptuously and in an insulting manner towards fellow employees in the period between the first and third of February 2007."
- [4] The reason for the long period of time between the applicant's dismissal and this review application is that the third respondent had applied to review the previous arbitration award in terms of which the applicant had been reinstated. In the absence of a complete record the matter was remitted back for a fresh hearing before the second respondent whose award was handed down on 7 September 2010. On 9 October 2013, the applicant launched an application to join the fourth respondent to these proceedings on the basis that the business of the third respondent had

been transferred to it under section 197 of the Labour Relations Act 66 of 1995 ('the LRA'). Initially, the third respondent gave notice of its intention to oppose this application but subsequently withdrew its opposition to the joinder and did not dispute the allegation that the business in which the applicant had been employed had been transferred to the fourth respondent.

- [5] The fourth respondent was represented by attorneys but also did not oppose the joinder application and the fourth respondent's attorneys of record withdrew on 05 October, a couple of weeks before the matter was heard on 22 October 2015. No representative appeared for the fourth respondent when the matter was heard.

#### The joinder application

- [6] On the basis of the founding affidavit, which is uncontested, it appears that the fourth respondent ought to be joined in the matter as the successor in title to the business of the third respondent for the purposes of section 197 of the LRA and the award was enforceable against it. Accordingly, the joinder of the fourth respondent is appropriate.

#### The review application

##### *The award*

- [7] The arbitrator held that the first and third charges related to alleged victimisation and insolence directed at female employees and considered three incidents which were the basis of the charges. In respect of the first incident in which he had implied that an employee was a management spy, the arbitrator found that it had been accepted as a joke and his apology had been accepted by the employee which settled that complaint. In another incident in which it was alleged that he had not assembled a pedestal fan for a customer, the arbitrator found on the probabilities that the incident never took place. In another incident in which he had threatened to Lodge a grievance against an employee because she had told him to put a smile on his face, but had not done so, whereas the employee had lodged her own grievance against him for being threatening

when she approached a customer he was not servicing, the arbitrator found that he had not contravened any rule. In relation to the second charge of incompatibility, the arbitrator found that the employee was not given an opportunity to respond to the allegations of incompatibility or to remedy the alleged disharmony he had caused and therefore found that the applicant was not incompatible. In light of these conclusions the arbitrator found that the applicant's dismissal was substantively unfair.

[8] However, when it came to the appropriate remedy, the arbitrator stated:

"The circumstances surrounding the employee's dismissal are such that it continued relationship would be intolerable. I have thus ordered compensation."

#### *Grounds of review*

[9] The contrast between the arbitrator's findings that the applicant was not guilty of the misconduct he was charged with, and his conclusion that it would be intolerable to reinstate him is very difficult to reconcile. This is particularly so in the light of his finding that the charge of incompatibility was not proven. Perhaps the explanation lies in the fact that the arbitrator only concluded that the applicant was not incompatible because the applicant was not given an opportunity to deal with his incompatibility. The arbitrator did not reach his conclusion because of insufficient evidence of the applicant's incompatibility. In other words, the arbitrator appeared to have made a finding on the substance of the charge of incompatibility based on evidence of procedural defects in dealing with incompatibility.

[10] The applicant argues that there was no evidence led by the employer, nor any other evidence, to suggest that a continued employment relationship would be intolerable and therefore no basis was laid for making any other order than an order of reinstatement.

[11] As the respondents have not sought to cross review the arbitrator's findings on the charges themselves, the court must accept those findings as unchallenged, however flawed they may be, and confine itself to consideration of the question whether the conclusion that a continued employment relationship would have been intolerable was a feasible one.

[12] In view of the nature of the review test based on rationality, the court may have regard to the arbitrator's reasoning but ultimately must decide whether the outcome is justified on the evidence that was before the arbitrator. In the latest iteration of the test of review relating to an arbitrator's factual findings, the LAC has stated:

"Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."<sup>1</sup>

(emphasis added – footnotes omitted).

[13] In this instance, the applicant essentially alleges that the arbitrator's material error was to reach a conclusion for which no evidentiary basis was laid, namely, that it would be intolerable for the applicant to return to

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<sup>1</sup> *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at 60-1, para[33].

work. The issue then was whether, irrespective of the arbitrator's own conclusions in relation to the charges against the applicant, this contention is valid in the light of the evidence before him. In evaluating the evidence before the arbitrator for this purpose, the essential issue is whether there was sufficient evidence before him to reach that conclusion.

[14] If one has regard to the record, though important testimony of Ms M Hadebe is incompletely captured, what emerges is that that there was considerable evidence that -

14.1 The applicant regularly got into arguments with other staff, arising more than once from his aggressiveness in trying to ensure he obtained a customer commission;

14.2 The applicant had a poor disciplinary record including *inter alia* warnings for physical and verbal abuse, disreputable behaviour and causing disharmony in the store, and gross insubordination.

14.3 The applicant could not work in harmony with other employees;

14.4 He was subject to swings in mood when he could become very aggressive;

14.5 He caused at least two female staff members to cry because of his comments about them;

14.6 At least two of the company witnesses expressed their reluctance to work with him again.

[15] The evidence mentioned emerged despite gruelling cross-examination of management witnesses three years after the incidents which led to his dismissal. For the purposes of the review it is not necessary for me to determine whether on a balance of probabilities I would have reached the conclusions suggested by the evidence in paragraph 14.2. It is sufficient that it would not have been unreasonable for the arbitrator to have reached the conclusion that it would be intolerable to reinstate the applicant in the sense that it would not have been an untenable conclusion to arrive at on the evidence notwithstanding some contradictions in the witnesses' testimony on points of detail. It is enough that the conclusion reached by the arbitrator is one feasible interpretation of the evidence.

[16] In the circumstances, despite his own lack of explicit reasoning on the appropriate remedy, and despite the flaws in his findings of guilt, I cannot say that his decision not to reinstate the applicant was one that no reasonable arbitrator could have taken considering the nature of the question to be decided and the competing interests affected by it. If anything, the applicant was fortunate that the arbitrator made questionable findings on the charges against him, which at least gave him a measure of compensation.

Order

[17] In light of the above,

17.1 the fourth respondent is joined as a respondent in the application;.

17.2 the review application is dismissed, and

17.3 no order is made as to costs.



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**Lagrange J**

**Judge of the Labour Court of South Africa**

**APPEARANCES**

APPLICANT: P Ngoato of SACCAWU

THIRD RESPONDENT: D O Pretorius of Fluxmans Inc.

FOURTH RESPONDENT: No appearance

LABOUR COURT