



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1232 / 2016

In the matter between:

VELLIE PETER SHABANGU

Applicant

and

**COMMISSION FOR CONSILIATION MEDIATION AND
ARBITRATION**

First Respondent

COMMISSIONER QANITA RUSTIN

Second Respondent

AMALGAMATED BEVERAGE

INDUSTRIES BOTTLING (PTY) LTD
Respondent

Third

Heard: 21 July 2017

Delivered: 29 August 2017

Summary: Review application – evaluating of evidence.

JUDGMENT

KRUGER A J.

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second Respondent (the commissioner) on 3 May 2016.
- [2] The third Respondent employed the Applicant as a special events coordinator/roadshow driver.
- [3] The third Respondent dismissed the Applicant on 9 November 2015. The reason for the dismissal was misappropriation or theft of two pallets of 330 ml plastic bottles of soft drinks. One pallet consists of 120 cases. One case has 24 bottles in it.

Preliminary Issues

- [4] The first issue is a condonation application for the failure of the Applicant to timeously deliver the transcript of the arbitration proceedings; and for the late filing of his replying affidavit.
- [5] The second issue is that the Applicant's heads of argument differs materially from the original grounds of review.
- [6] In my view, the Applicant's conduct is not such that it warrants the refusal of this application for condonation and therefor condonation is granted.
- [7] I will deal with the additional grounds of review, contained in the Heads of Argument, later in my judgment.

Factual Background

- [8] The Applicant's duties included the transportation of promotional items, the distribution thereof and the management of promotional stock.
- [9] On 10 May 2015, the Applicant and three of his colleagues were required to distribute 330 ml soft drinks at a soccer event in Alexandra.
- [10] After the event, the Applicant made an unauthorized detour to Weimmerpan and on 12 May 2015, a certain Chauke had to take promotional stock to the next sampling event.

- [11] Between 10 and 12 May, two pallets had gone missing and the third Respondent dismissed the Applicant for his failure to explain how the loss came about.

The arbitration proceedings and the award

- [12] In his analysis the second Respondent stated that –

“The fact that there was overwhelming evidence presented that the distribution of 225 cases on 10 May 2015 was highly improbable provides a context within which to determine whether it is probable that the applicant misappropriated and / or stole two pallets. The respondent never found the applicant guilty for the anomaly of 225 cases distributed.

He was dismissed for the empty pallet seen at the Three Square by Mr. Mabasa and for the pallet that was missing when the truck was first opened since 10 May 2015 at the depot as seen by Mr. Chauke. During this time, the Applicant was the one who was accountable for the stock”

- [13] The Second Respondent went further and found that the witnesses for the Third Respondent were credible and that the Applicant was –

“evasive as he could not recall basic details expected of the person who was entrusted with the event and someone with fourteen years of experience in the job”

- [14] The second Respondent found that the dismissal was fair.

Grounds for Review

- [15] The Applicants contend that the Second Respondent committed misconduct in relation to his duties and that he committed a gross irregularity rendering the award reviewable. The Applicant relies on the following grounds:

- “ a..... No evidence was presented that I was seen to have taken ABI's sampling items;
- b. I was at all relevant times in the presence of my peers;
- c The distribution was overseen by the project manager, Hymie, who did not testify at the disciplinary or arbitration hearing;

- d The private investigator that was appointed by ABI could not prove any misconduct on my part;
- e No instruction that items were to be distributed to soccer players and coaches only was issued;
- f The number of cases misappropriated did not add up to the number of actual stock missing, considering the fact that sampling items were distributed on that day.
- e As a result and considering the aforesaid, I respectively contend that the Arbitrator incorrectly found that the balance of probabilities favoured ABI.

Applicant's Heads of Argument

[16] Ms Oschman argued on behalf of the Applicant that two witnesses testified that they had noticed that two pallets of soft drinks were missing. There was no direct evidence of theft or misappropriation. The Second Respondent therefor had to resort to circumstantial evidence in order to reach a finding.

[17] She argued that the Second Respondent made credibility findings but that she did not consider the probabilities that emanated from the evidence. Furthermore, the Second Respondent did not consider the circumstantial evidence and she did not apply the test as set out in *AA Onderlinge Assuransie Bpk v De Beer*¹. Lastly, she argued that if one does a mathematical calculation, the evidence of the Respondent was less probable.

Analysis

[18] I am prepared to accept that the Heads of Argument did not introduce a new ground of review but that it clarified the probability argument as set out in the original Notice of Motion.

[19] The Second Respondent is in a much better position than this Court to make a finding on credibility and a court of review must be reluctant to interfere on such a finding. In this case, the Second Respondent clearly analysed the evidence and it is noteworthy that the Applicant did not challenge the credibility finding. It is furthermore important to note that material evidence of

¹ 1982 (2) SA 603 A at 614 A-B

the Respondent were unchallenged and that the Applicant did not put his version to the witnesses of the Respondent. It is trite law that the failure to put certain facts in issue while a witness is being cross examined can lead to the conclusion that those facts are undisputed and can be accepted as proven. This rule is dependent on the degree of sophistication of the representatives of the parties. In this case the Applicant was represented by an attorney and no explanation was given as to why material evidence were not challenged.

- [20] The argument that the Second Respondent made a credibility finding but did not consider the probabilities is not correct. In *National Employers' General Insurance CO v Jagers*²

“..... the court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true.”

- [21] Based on the evidence that was presented to the Second Respondent; his finding on credibility; the fact that material evidence was not challenged; I cannot find that his findings were unreasonable and that the probabilities did not favour the Third Respondent. The fact that the Second Respondent did not specifically mention in his award that he considered the various probabilities did not make the award reviewable.

- [22] The application to review the award of the Second Respondent stands to be dismissed.

Costs

- [23] Costs should be considered against the requirements of the law and fairness.
- [24] The requirement of law has been interpreted to mean that the costs would follow the result.
- [25] I take into consideration various aspects of social justice and that the Applicant lost his income and that he is now unemployed. That a cost order would in all likelihood have a negative effect on his family.

² 1984 (4) SA 437 E AT 440 D

[26] In the premises I make the following order:

Order

1. The Applicants application for review is dismissed;
2. There is no order as to costs.

Werner Kruger

Acting Judge of the Labour Court

Appearances:

For the Applicant : Advocate Oschmann

Instructed by : Deodat Marais Attorneys

For the Third Respondent: Advocate. C Orr

Instructed by Bowmans Attorneys