THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case no: PR244/21

In the matter between:

COCA COLA BEVERAGES SOUTH AFRICA (PTY) LTD Applicant

And

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION First Respondent

THEMBAKAZI MLINDAZWE N.O. Second Respondent

SHANDRIL MAPHANGA Third Respondent

Heard: **22 January 2025**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is deemed to be 13 February 2025.**

Summary:

The third respondent was reinstated by the second respondent. The applicant seeks to review the award of the second respondent.

Held, the second respondent, confronted with two different versions, did not consider the probabilities of the conflicting versions. Her award is not one that a reasonable decision maker would have made.

JUDGMENT

SEEDAT AJ

Introduction[1]

[1] The third respondent (Mr Maphanga) was employed as a sales manager for the Eastern Cape Region of the applicant (CCBSA) based in Mthatha. This was a senior position with account managers (sales representatives) reporting to him.

[2] Part of Mr Maphanga's duties was to ensure the sustained profitability of CCBSA and to promote good relationship with clients especially the major retail outlets.

[3] CCBSA had an arrangement with the Spar store that it would pay R1,700.00 a month to the store for sales from a cooler provided by CCBSA. As sales manager it was Mr Maphanga's responsibility to submit an invoice, for Spar to be paid. He did not do so. Spar was unhappy that it did not receive its money and was only paid after the district manager of CCBSA intervened.

[4] Mr Maphanga also had to conduct trade visits and mentor and coach account managers as part of his managerial portfolio.

[5] On 22 July 2019 Mr Maphanga received a final written warning for gross dereliction of duty 'in that you had failed to prepare and submit your YTD presentation and 7 week plan as instructed'.

[1] The bundles prepared by the applicant were in disarray. At the commencement of the hearing, I stood the matter down for the applicant to re-arrange the documents in the files. Even so, the numbering in bundle B ran up to a point, then recommenced with another sequence and at times there were gaps in the numbers. I had to rummage through the file to find documents referred to in the papers and heads of argument. Two weeks later I received another bundle purportedly aligned with the pleadings but again the numbering did not correspond to the pleadings and heads of argument.

[6] On 26 July 2019 Mr Maphanga was charged with gross dereliction of duty –

- for failing to submit the cooler fees for payment to a customer
- neglecting to make trade visits to coach three new account managers

[7] The chairperson of the disciplinary hearing found Mr Maphanga guilty on both counts and relying on the final written warning issued on 22 July 2019, came to the conclusion that dismissal was an appropriate sanction.

[8] Mr Maphanga referred an unfair dismissal dispute to the CCMA challenging the reason for his dismissal. He accepted that the procedure followed by CCBSA was fair.

[9] On 3 November 2021 the CCMA commissioner declared the dismissal of Mr Maphanga unfair and ordered his reinstatement from 19 November 2021.

[10] This application is a review of the commissioner's award.

The review application

[11] While the applicant delineated seven grounds on which it founded its review application, the real issue is to determine whether the decision reached by the commissioner is one which a reasonable commissioner might not have reached.

The award

[12] The commissioner agreed that Mr Maphanga 'ought to have been aware that an invoice was required' particularly because he was a senior manager and she accepted the finding of guilt on the first charge.

[13] The second charge however, said the commissioner, could not be sustained on the evidence presented to the commissioner. There was no stock in the stores and *'[d]emonstrating to the new AMs [accounts managers] what needed to be done in trade, without stock would have been futile exercise as the AMs would not have been able to practically apply what they had been taught without stock'.*[2]

Analysis

[2] Award at para 115

[14] That the commissioner may have agreed with CCBSA on the first charge and took issue on the second charge is of no consequence. The reviewing court 'must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could have made'.[3]

[15] Save for a synopsis of the evidence, I do not intend to go into a detailed analysis of the evidence given by the two witnesses for CCBSA and the applicant at the arbitration hearing because a reviewing court is not required to consider every issue raised at the arbitration.[4]

[16] Mr Shuttleworth, an area manager, said that failure to submit an invoice for payment to a customer was a serious transgression. And spending time with the account managers and coaching them was 'very critical' to the functions of a senior manager. Three account managers complained that Mr Maphanga was not spending time with them in the stores. One accounts manager resigned because she had no support from Mr Maphanga.

[17] Mr Maphanga avers that he was never told about the customer's invoice. On the failure to coach account managers, he maintained that he could not do in trade[5] coaching because there were no stocks at the stores. He did coach his subordinates 'telephonically through WhatsApp'.

[18] There obviously was a factual variance between the version of CCBSA and the narrative of Mr Maphanga. The approach to the resolution of factual disputes was explained by Nienaber JA in *SFW Group Ltd & another v Martell et Cie & others*[6] as follows:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

---

[3] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC) at para 18
[4] *Penbro Kelnick (Pty) Ltd v Commission of Conciliation, Mediation and Arbitration and others* [2024] 7 BLLR 759 (LC); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC)
[5] This probably means training of managers in customers' stores.
[6] 2003 (1) SA 11 (SCA) at para 5

[19] The commissioner was obligated to establish the truth. This should have compelled her to consider the probabilities of the conflicting versions before her. Of course, the credibility of the witnesses would have been an aid in weighing up the probabilities and coming to a conclusion that would be reasonable in the factual context. This the commissioner did not do. Instead we have the commissioner's finding that CCBSA's 'operations were in a state of disarray, and this affected its employees' ability to perform their primary functions'. What was the disorder that gripped CCBSA[7] and did this impact on the ability of *all* its employees to perform their primary function which were not defined?

[20] In deciding whether the decision of the arbitrator is reviewable, the test is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.[8]

[21] The Constitutional Court in *CUSA v Tao Ying Metal Industries & others*[9] reminded us:

> *'It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside.'*

[22] The award of the commissioner is anything but reasoned. It is deficient in the critical analysis of evidence and a thoughtful outcome. The commissioner had undertaken the enquiry in a misconceived manner and came to a conclusion that would not be reasonable in the factual context.

[23] Clearly, the commissioner did not apply her mind to all the material issues and as a result she committed gross irregularities in the conduct of the arbitration. In analysing the material before the commissioner, I must find that that the award is not one which a reasonable decision maker could have made.

[24] The parties had also argued whether a warning given to an employee for a transgression that happened after that employee had been charged on another offence can be considered in determining sanction in a disciplinary

---

[7] Was the supposed failure to supply stock rendering the operations of CCBSA in disarray?

[8] *Sidumo & others v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para 110; *Fidelity Cash Management Service v Commission for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC) at para 103; *Palluci Home Depot (Pty) Ltd v Herskowitz & others* (2015) 36 ILJ 1511 (LAC) at para 16; *Duncanmec (Pty) Ltd v Gaylard NO* (2018) 39 ILJ 2633 (CC) at para 43

[9] (2008) 29 ILJ 2461 (CC) at para 76

hearing. Having found the award of the commissioner reviewable on the facts, I can only postulate that it would not be fair for the employer to take cognisance of a warning for an offence that occurred after the employee had been charged for another infraction.

[25] Given that there are issues of fact flowing from the award that can only be articulated on evidence, the appropriate relief is to set aside the award and refer it back to the CCMA to be heard *de novo* by another commissioner.

[26] In the interest of law and fairness, there is no order as to costs.

[27] The following order is therefore made:

Order

1. The arbitration award of the second respondent given under case number ECEL5580-19 dated 3 November 2021 is reviewed and set aside in its entirety.
2. The dispute between the applicant and the third respondent is remitted to the first respondent for a hearing *de novo* before another commissioner.
3. There is no order as to costs.

S Seedat

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

Applicant:	Advocate JG Grogan
Instructed by:	Moeletsi Attorneys Inc
First Respondent:	Mr. DT Mokwena of DT Mokwena Attorneys Inc