IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J 1869/00

In the matter between:

GULL FOODS (PTY) LTD	Applicant
and	
MATLALA, L N N.O.	1st Respondent
CCMA	2nd Respondent
GALELA, B D	3rd Respondent

JUDGMENT

CORAM : A VAN NIEKERK AJ

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the LRA"), to review and set aside an arbitration award made by the First Respondent, a Commissioner of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The award was made on 15 March 2000, and in it the First Respondent ordered that the Third Respondent be reinstated in her employ and paid compensation equivalent to 10 months' remuneration.

[2] The Applicant has been unable to provide a record of the arbitration proceedings as required in terms of the rules of this Court. The Applicant has made the effort to compel discovery of the record, but it appears that the CCMA has mislaid the file. The matter was therefore argued on the basis of the affidavits and supporting documentation filed by the respective parties, and the terms of the award itself. I shall return to this aspect and its appropriate consequences after giving consideration to the arguments raised by the parties.

[3] The Third Respondent was employed by the Applicant as a supervisor. The Applicant alleges that on 4 January 1999 she was found by her manager, outside her workplace, sitting down together with another supervisor. The Third Respondent informed her manager that she was ill. The manager had been told by one of the Applicant's other employees that the Third Respondent was smelling of alcohol. The Third Respondent was asked by her manager whether she had consumed alcohol, which she denied.

[4] The Third Respondent was sent to the local clinic, where she was examined. The nursing sister on duty called the manager and advised him that the Third Respondent should not be permitted to work with knives, as she appeared to be drunk. In consequence of this conversation, the Third Respondent was sent for a blood test. The results of the blood test, made available a day later, indicated that the Third Respondent had a blood alcohol level of 0.16 g per 100 ml. It is

trite that this exceeds the permissible blood alcohol level in terms of the National Road Traffic Act by more than three times.

[5] After further investigation, the Applicant discovered that 5 to 6 tots of brandy were missing from a fridge to which the Third Respondent had access.

[6] A disciplinary enquiry was conducted on 7 January 1999. At the enquiry, the chairperson of the enquiry, a Mr R Store, is recorded as having testified at the arbitration hearing that the Third Respondent pleaded guilty to allegations of being drunk during office hours and the theft of company property, and confined her representations to a plea for leniency. He stated that the Third Respondent was invited to give evidence in mitigation. The mitigating factors are recorded in the note of the enquiry as matters relating to the Third Respondent's personal circumstances and in particular, marital difficulties that she was experiencing.

[7] The Third Respondent is recorded as having denied at the arbitration proceedings that she consumed alcohol on the employer's premises. She further denied being under the influence of alcohol, and denied stealing brandy from the fridge. She stated that she had a stomach ache on 4 January 1999 and that she had been given a cup of vinegar to drink. She admitted having been sent for the blood test after her manager had been informed by another employee that she smelt of alcohol. She

denied pleading guilty at the disciplinary enquiry to the charges against her. In her answering affidavit, the Third Respondent states that her manager had insisted that she must plead guilty to the charges, which she refused to do.

[8] In his award, the First Respondent recorded that it was common cause that the Third Respondent had been dismissed. In so far as the charge of being under the influence of alcohol while on duty was concerned, the First Respondent found that the evidence given by the manager to the effect that he had been telephoned and told that the Third Respondent had been drinking, as well as the information given by another employee who said that the Third Respondent was smelling of alcohol, was hearsay. The First Respondent found that the Applicant had relied entirely on the results of the blood test to form an opinion on the Third Respondent's condition. In the First Respondent's view, the result constituted evidence which was not admissible unless given by an expert. In the absence of any expert witness called to give evidence at the arbitration proceedings, the First Respondent refused to accept the results of the blood test as proof of the Third Respondent's intoxication. The First Respondent held further that the Third Respondent had continued working until the end of the shift of 4 January 1999 and it could not therefore be said that she was unable to perform the tasks entrusted to her, nor was any other behaviour suggesting intoxication observed. In relation to the allegation of theft, the First Respondent dismissed the evidence against the Third Respondent as unreliable and amounting to

no more than a suspicion. He concluded that the dismissal of the Third Respondent was substantively unfair but procedurally fair, and ordered the Applicant to reinstate the Third Respondent and to pay her compensation equivalent to 10 month's remuneration.

[9] The test to be applied in an application for review brought in terms of section 145 is well established. An award made by a Commissioner can be set aside if it is not justifiable as to the reasons given by the arbitrator having regard to the evidence led in the arbitration proceedings under challenged. (See *Carephone (Pty) Ltd v Marcus NO & others* (1998) (19) *ILJ* 1425 (LAC) and *Shoprite Checkers v Ramdaw NO & Others (*(2001) 22 *ILJ* 1603 (LAC). The arbitrator must therefore have applied his mind seriously to the issues before him and reasoned his way to the conclusion he reached in the sense that the conclusion must be justifiable as to the reasons given for it. In this matter, it appears to me that the First Respondent did not properly determine the evidence before him. He did not have regard to the following:

9.1 that the Third Respondent was behaving abnormally to the extent that she was sent to the clinic;

9.2 that her blood alcohol content was tested on the same day;

9.3 that it was never in dispute that the blood test result was in respect of the test conducted, nor was the result of the test ever contested;

9.4 that the evidence of Store, the chairperson at the disciplinary enquiry was never rejected by the arbitrator as being untrue, nor was the document generated at the time of the hearing, which recorded an admission of guilt by the First Applicant, ever properly c onsidered or rejected; and

9.5 the Third Respondent had simply offered a bare denial both in response to the charges against her and in relation to her conduct during the disciplinary enquiry in circumstances where the probabilities did not favour the version proffered by her.

[10] In the circumstances of a disciplinary hearing, and in particular in the face of what ought to be have been accepted as an admission of guilt on the charges against her, expert evidence was not necessary to establish that the Third Respondent was under the influence of alcohol. The result of the blood test was not put in dispute, nor was its accuracy contradicted, during the arbitration proceedings. The First Respondent appears to have adopted an overly technical approach by refusing to consider the result of the blood test and drawing self-evident conclusions from that result. His apparent insistence on the evidence of an expert, who might offer evidence only in relation to the degree of the Third Respondent's

intoxication and its effect on her work performance, was misguided. In relation to the charge of theft, the First Respondent's finding that the dismissal was unfair since the evidence against her amounted to a mere suspicion is on the face of it similarly not justifiable in relation to the evidence before the First Respondent . First, the Third Respondent admitted guilt to the charge in the disciplinary enquiry, secondly, it was never in dispute that the bag of brandy in the fridge had been opened and that brandy was missing from the bag, thirdly, it appears to be common cause that the Third Respondent had access to the brandy in the fridge and finally, the probability is that the Third Respondent could not obtain the liquor from anywhere else and as I stated above, on balance, she was under the influence of alcohol on the afternoon in question. However, in the absence of a record and without knowledge of precisely what evidence, circumstantial or otherwise, was adduced during the arbitration proceedings, I am unable to make a finding in this regard.

[11] I am persuaded that on the basis of the affidavits filed by the parties and the terms of the award itself, that for the reasons above, the award stands to be reviewed and set aside. In any event, and irrespective of my finding in this regard, the absence of a record in these circumstances warrants the same conclusion. This Court has held previously that the failure to provide a proper record of arbitration proceedings is in itself a ground for setting aside an arbitration award. In these circumstances, it would be futile to further attempt to compel the record or seek its

reconstruction. In my view, this is an appropriate case for setting aside the award for the additional reason of a failure by the CCMA to furnish the Court with a record of the arbitration proceedings. It is not the Applicant's fault that the CCMA's file has been lost and on balance, it appears to me when considering the respective prejudice to the parties that the Applicant's right of review is an over-riding consideration. It is unfortunate when in circumstances such as these, a matter has to be reheard, but it would seem to me that an order to that effect would be equitable.

[12] I make the following order:

1 the award made by the First Respondent dated 27 March 2000 under case number GA 56865 is reviewed and set aside;

2 the matter is referred back to the CCMA for rehearing before a different Commissioner; and

3 there is no order as to costs.

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ANDRE VAN NIEKERK,
Acting Judge of the Labour

Date of judgment: 20 October 2003

Attorneys for Applicant: Snyman van der Heever Heyns

Attorneys for Respondent: Mohlaba and Moshona Inc.