**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNERSBURG**

**CASE NO: JR 846 /02**

In the matter between

**GALLO AFRICA LIMITED** **APPLICANT**

and

**ADVOCATE SALEM SEEDAT, N.O** **RESPONDENT**

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**JUDGMENT**

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**SEMENYA AJ**

[1] Advocate Saleem Seedat, sitting as an arbitrator made an award on 4 May 2002 for the reinstatement of the second respondent having concluded that the dismissal of the respondent was unfair. This is an application in terms of section 158(1)(g) of the Labour Relations Act, 66 of 1995**("the Act")** wherein the applicant seeks, *inter alia*, the stay of the arbitration award and that the arbitration award reviewed and corrected or set aside.

[2] There are two bases offered why the award of the arbitrator stands to be reviewed and corrected or set aside. In the first instance it is alleged that the arbitrator is guilty of gross irregularity in the conduct of the proceedings when he applied an incorrect test to determine

whether the employer has discharged its onus in establishing the dismissal of the second respondent to be fair. It was argued that the arbitrator's finding couched in the terms repeated hereunder show him to have applied a wrong test. The relevant section of the award reads:

**"There is no direct evidence that Mofokeng took the digital video disks. It is obvious, though it was never argued by Gallo, that it seeks to rely on circumstantial evidence to make a finding of guilt. For circumstantial evidence to be conclusive, the inference drawn must be consistent with all the facts proved.**

**The inference that Mofokeng had taken the digital video disks is not the most plausible conclusion. There was no evidence by Gallo that the big box was not returned to Gallo on 26 July 2001 or that it was returned, but opened or damaged. Again, Gallo did not establish whether the two digital video disks delivered to CNA on the 30 July 2001 were part of the original delivery or that they had been dispatched by Gallo. The imponderables are too many to make a conclusive finding".**

[3] The second ground offered for the contention that the award stands to be reviewed and corrected or set aside is that the arbitrator committed a misconduct in relation to his duties or is guilty of gross irregularity when he found that the employer did not discharge its onus in proving the dismissal to be fair. It was argued that the arbitrator ought to have had regard to all the evidence. The relevant section of the award to which this attack is launched is phrased in the following language:

**"…the evidence of Gallo … compels me to find that Gallo did not discharge the onus of proving that the dismissal was fair. This, is of course, relieves me of the duty to consider the evidence of Mofokeng and make any finding on a balance of probabilities."**

[4] I have quoted the aspects of the award that the attack is aimed at. A proper and close reading of the award reveals that whereas the arbitrator uses the words **"conclusive"** and **"most plausible"** he was not unaware that the proper tests to be applied is one on a balance of probabilities. I am vindicated in that view, particularly when in the same award the arbitrator looks at the probabilities to determine whether the onus was discharged or not. The nomenclature of conclusive and most plausible seems to be unfortunate but also of no consequence. Even if there could be a case made out to suggest that there was some irregularity, it is difficult for me to see how the evidence properly assessed could show the employer to have done enough to discharge the onus.

[5] The second attack that the arbitrator did not look to the totality of the evidence is without merit. The record of the proceedings (gleaned from the notes) clearly illustrate that the arbitrator took meticulous notes and considered the entire evidence. To hold different would not explain why he mentions a **"yawning hiatus"** in the evidence of the employer. I did not understand the argument to suggest that a closer look at the evidence of the second respondent reveals answers to those questions that remain unanswered. As pointed out in the often cited judgment **of Carephone (Pty) Ltd v Marcus N O & others Froneman DJP** at paragraph 36 sounds the caution:

**"As long as the judge determining this issue is aware that she or he enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."**

[6] In the circumstance, I am unable to find a sufficient cause to have established why the arbitrator could be said to be guilty of any conduct that exposes the award to be corrected or set aside. The application therefore is dismissed with costs.

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Semenya AJ

Appearance:

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| For the Applicant | : | Mr Jerry Kaapu |
| Instructed by | : | Bowman Gilfillan |
| For the Respondent | : | Adv. Seleem Seedat NO |
| Instructed by | : | SACCAWU Wits Legal Unit |

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| Date of hearing | : | 12 February 2004 |
| Date of Judgement | : | February 2004 |