

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: C449/2004

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In the matter between:

<u>NATIONAL UNION OF MINEWORKERS</u>	First Applicant
<u>BACHEBILE WILLIAM MOGOROSI &</u>	Second and Further
<u>SIX OTHER</u>	Applicants

10

and

<u>COMMISSION FOR CONCILIATION,</u>	First Respondent
<u>MEDIATION & ARBITRATION</u>	

15 <u>COMMISSIONER CARMEN WARD N.O.</u>	Second Respondent
<u>MAGOGONG BRICKWORKS (PTY) LTD</u>	Third Respondent

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J U D G M E N T

NEL AJ:

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1] This is an application in terms of section 145 of the Labour Relations Act to review and set aside the arbitration award in the Commission for Conciliation, Mediation & Arbitration, case number NC847/04, issued on 23 July

2004 by the second respondent ("the Commissioner").

2] The applicants applied for condonation of the late application for review. I am of the view that the condonation application is defective in a number of respects. It first of all does not advise me how late the application is. The allegation is made that the arbitration award was handed to the individual applicants on or about 23 September 2004. It would appear from the date stamp as if the review application was filed in this Court on 6 October 2004. On the face of it, that does not appear to be late.

3] The reason for the purported lateness is also rather inadequate. Likewise, prospects of success are dealt with by simply stating that: *"... As will appear later on in the affidavit, our case is based on good merits"*.

4] As a result of the conclusion which I have arrived at herein I do not intend dealing in any detail with the defects in the condonation application. As I have concluded that the application to review should fail, against the background of what I believe to be a defective application for condonation, I do believe that the condonation application itself ought also to fail.

5] A perusal of the record of the arbitration proceedings reveals that Magogong Brickworks (Pty) Ltd, (the third respondent herein) also operated at a depot in Kimberley, to which it regularly delivered bricks. Warrenton is a town

on the way between Magogong and Kimberley.

6] Ms Jacobs, a Warrenton resident, who has nothing
whatsoever to do with the third respondent, testified at the
5 arbitration that, over a period of approximately a month,
she witnessed a truck belonging to the third respondent
making small deliveries to a neighbouring property in
Warrenton. On 25 March 2004, someone other than Ms
Jacobs had telephoned the owners of the third respondent
10 and advised them of these deliveries which were apparently
made daily at about 11h25. Ms Jacobs identified the
driver at both the disciplinary enquiry and at the
arbitration. Although she could not definitively identify the
team of loaders assisting the driver, the Commissioner
15 concluded that the driver had been identified positively,
and with conviction, and that the only reasonable inference
to be drawn was that, as the team and driver stayed the
same as long as the truck and driver stayed the same, the
team making up the applicants before the Commissioner
20 was indeed involved.

7] Shortly after the bricks had been delivered in Warrenton on
25 March 2004, Mr Botes, the son of the owner of the
third respondent, arrived at the site and his evidence was
25 that the bricks could easily be identified as belonging to
the third respondent. In addition, he testified that the
bricks were still hot to an extent not caused purely by the
sun, but from having been baked in a kiln. He further
testified that he roughly estimated that the number of
30 bricks belonging to the third respondent and used by the

party identified as "Whitey" amounted to approximately 24 000 to 30 000 bricks. This person "Whitey" had not placed any order, and no deliveries were supposed to have taken place to Whitey or his address.

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8] Mr Botes testified that they proceeded from Warrenton to Kimberley and caught up with the truck delivering bricks from the third respondent to its Kimberley depot and, on arrival at the Kimberley depot, they counted the bricks and found that the proper quantity, namely 8 000 bricks, were contained on the truck. He testified that it was possible to convey an extra layer of bricks but that the correct number for the truck and trailer in question was 8 000.

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15 9] One of the loaders on the truck, a Mr Solomon Mosweswe, the eight applicant herein, was taken back to the delivery site in Warrenton and he confirmed that the bricks which had been delivered did belong to the third respondent. He, however, denied that the truck on which he was that day had stopped or turned off the road that day and his evidence was to the effect that they had driven straight to Kimberley.

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10] The driver of the truck on the day in question was a Mr Elias Nkosi, the sixth applicant. He identified the team who was with him on this day during his testimony before the arbitrator. Mr Nkosi denied that he offloaded bricks on 25 March 2004, as was alleged by Ms Jacobs.

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11] Mr Cloete, who appeared before me on behalf of the applicants, during argument before me conceded that the driver was properly found guilty of the misconduct with which he was charged. He accordingly focused his argument on the applicants who were only loaders on the day in question. He contended that they were charged with theft and not with unfaithfulness or for not having reported the theft. His argument was in essence that the driver was the only person involved in all the paperwork relating to the delivery of bricks and that the loaders would accordingly not have any knowledge if bricks were unlawfully offloaded at the wrong, or an unauthorised, address. If I understood his argument correctly, he further contended that these loaders would also not know if excess bricks were loaded on the trucks.

12] There are a number of difficulties which I have with his contentions. Only one of the loaders testified at the arbitration. He, as did the driver, denied that any delivery of bricks took place in Warrenton as was alleged by Ms Jacobs. The evidence of this one loader was not to the effect that he admitted that bricks were delivered to the Warrenton address of Whitey, but that he did not know that that was not a proper delivery. He denied any involvement in any delivery to the Warrenton address the day in question. As I have said, none of the other loaders testified at all.

13] What accordingly was before the Commissioner was the

evidence from Ms Jacobs that she had witnessed a truck belonging to the third respondent over a period of approximately a month making very regular small deliveries to her neighbour, Whitey. Her evidence was also to the effect that she had ample opportunity to identify the driver, whom she, as I said, had pointed out at both the disciplinary enquiry and the arbitration.

14] A perusal of the Commissioner's award reflects that she dealt logically and comprehensively with each and every one of the arguments raised before her as to why she should not find the employees before her guilty of the misconduct with which they were charged. The reasons provided by the Commissioner why she in effect found all the employees before her, that is the driver as well as the loaders, guilty are, in my view, perfectly sound. Sight cannot be lost of the fact that the driver and the one loader denied having delivered the bricks on the day in question. If the loaders had an innocent explanation, as contended by Mr Cloete, I am satisfied that the Commissioner was entitled to draw a negative inference from the silence on the part of all the loaders but one. Similarly, I believe the Commissioner was justified to conclude that the bricks belonging to the third respondent were in fact on the day in question delivered unlawfully to an address in Warrenton and that such delivery had been effected by the driver and his team on the truck which on the day in question took bricks from the third respondent's Magogong Brickworks to its depot in Kimberley.

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15] The contention on behalf of the applicants that the Commissioner did not properly consider the burden of proof is without merit. The Commissioner was confronted with two mutually destructive versions. On the one hand she had the evidence from Ms Jacobs of the regular deliveries of bricks from a truck which was unquestionably identified as one belonging to the third respondent. The bricks found on 25 March 2004 by Mr Botes of the third respondent were both identified as belonging to the third respondent and, importantly, those bricks were still hot, not because of the sun, but because of having recently come out of a kiln. Weighing up all the probabilities, and against the background of the denial by the driver and the one loader that they, on 25 March 2004, did offload bricks at the address in Warrenton, as well as the silence on the part of the other loaders, these factors were all correctly analysed by the Commissioner. Her conclusion, that the dismissal of all the individual applicants before her stood to be confirmed, was justifiable and rational having regard to the reasons given for her conclusion as well as the evidence and the material which were placed before the Commissioner.

16] I am accordingly satisfied that the Commissioner herein has not perpetrated any irregularity and/or misconduct warranting any interference with the award of the Commissioner. It follows that the application stands to be dismissed. The applicants are ordered to pay the third respondent's costs of suit.

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DEON NEL

5 Acting Judge of the Labour Court.

Date of Hearing: 8 August 2006

Date of Judgment:

10 **Appearances:**

On behalf of the applicants: Mr N Cloete of N CLoete Inc.

On behalf of the third respondent: Advocate R G Beaton

Instructed by Edward Hobbs Attorneys.