IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case number: JR1552/04

In the matter between:

MOQHOISHI, TSEKO JOHANNES **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

DELL, CHARLE N.O **Second Respondent**

SOUTH AFRICAN POST OFFICE **Third Respondent**

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application for the review and setting aside of an arbitration award made by the second respondent on 25 May 2004

under the auspices of the first respondent. In that award, the second respondent found that the applicant's dismissal was substantively fair.

[2] Section 145 of the Labour Relations Act on which the applicant relies for this review application requires the applicant to prove one of four grounds of review. These are misconduct on the arbitrator's part in relation to his duties as an arbitrator; gross irregularity in the conduct of arbitration proceedings; *ultra vires* conduct by the arbitrator in the exercise of his powers and an improper obtaining of the award. On a *conspectus* of all the cases, however, it seems to me the permissible grounds of review are wider than those set out in section 145 of the Act and can perhaps be reduced to this: for the applicant to succeed the decision must be shown to be irrational (in the sense that it does not accord with the reasoning on which it is premised or the reasoning is so flawed as to elicit a sense of incredulity) and unjustifiable in relation to the reasons given for it (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp NO* (2002) 23 *ILJ* 863 (LAC) at paragraph [19]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 *ILJ* 1603 (LAC) at paragraph [26]; *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 *ILJ* 1425 (LAC) at paragraph [37]; *Pharmaceutical*

Manufacturers' Association of SA and Others: In re Ex Parte Application of the President of the RSA and Others 2000 (3) BCLR 241 (CC)). It is not the reviewing court's task to consider whether or not the decision is correct in law as that would be an appeal (*Minister of Justice and Another v Bosch NO and Others* (2006) 27 *ILJ* 166 (LC) at paragraph [29]).

[3] The applicant urges that the second respondent based his decision on the applicant's demeanour rather the evidence before him in respect of the two counts with which the applicant had been charged and subsequently dismissed. There is much evidence of this in the transcribed record of the arbitration proceedings, the second respondent repeatedly referring to the applicant not creating "*a good impression*" while the employer's witnesses "*created a much better impression with myself*". This pervades the entire award and clearly played a considerable part in the second respondent readily accepting the version of the third respondent's witnesses and dismissing that of the applicant as "skimpy".

[4] Much of the relevant evidence before him was not even considered, such as the disciplinary hearing record. Counsel for the third respondent submitted that since the arbitration was a *de novo*

determination of the matter, the second respondent did not have a duty to have regard to the disciplinary hearing record. I disagree. The record was before him because the chairman of the disciplinary hearing was called by the third respondent as a witness. Had the second respondent had regard to that record he would have found the investigation into the applicant's alleged gross negligence (count 2) was conducted on 11 April 2004 but the hearing itself was only held five months later in September 2004. It is trite that a disciplinary hearing must be held as soon as possible after the alleged offence. The lateness of the hearing raises questions as regards the memory of witnesses and preservation of documents and such like.

[5] There was also evidence that the applicant was not always present when the pre-paid cellphone cards were being counted by Van Graan. Even Van Graan admitted under cross-examination that he did the counting of the cards alone. This raises the question of whether it is not at all conceivable that those cards could have gone missing while the applicant was not there. It did not even occur to the second respondent to consider that evidence as he was pre-occupied with the impression the witnesses were making.

[6] As regards the charge of fraud that the applicant gave a customer a receipt for R102 when he had allegedly paid R1022, there is mention made of a passenger or two in the customer's car who came with him to pay the account. It was alleged in evidence that one of them counted the money as being R1022. But none of those persons were called as witnesses to corroborate the third respondent's version. The so-called confession that the applicant did admit to receiving R1022 from the customer was disputed by the applicant.

[7] There was also the evidence that the customer who claimed to have paid R1022 (and not R102) subsequently came to pay the balance of R900 at the third respondent. Counsel for the third respondent sought to testify from the Bar in submitting that the R900 was later returned to the customer at the conclusion of the investigation. But there is nothing to that effect on the papers. In any event, the version of the repayment of the R900 to the client after investigation was not put before the second respondent. It was never put to the applicant in cross-examination either.

[8] In the result, I am satisfied that the decision of the second respondent is not justifiable in relation to the evidence advanced before him. Consequently,

[a] the award under case number FS57756/2003 is hereby reviewed and set aside.

[b] the matter is referred back to the first respondent for a *de novo* determination before a different commissioner.

[c] the third respondent is ordered to pay the costs of this application.

Ngalwana AJ

Appearances

For the applicant:	*Mr MJ Ponoane*
Instructed by:	*Ponoane Attorneys*
For the 3rd respondent:	*Mr H Schensema*
Instructed by:	*Nkaiseng Chenia Baba Pienaar and Swart Inc.*
Date of hearing:	*12 June 2007*
Date of judgment:	*22 June 2007*