

**IN THE LABOUR COURT OF SOUTH AFRICA HELD IN
JOHANNESBURG**

Case no: JR 1422\05

In the matter between:

NATIONAL UNION OF MINeworkERS	First Applicant
H.J. MAHORI	Second Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
BERNARD VAN ECK NO	Second Respondent
RUSTENBURG PLATINUM MINES LIMITED (UNION SECTION)	Third Respondent

JUDGMENT

MOSHOANA AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act as amended. Both parties also filed applications for Condonation. The Applicant's application relates to the late filing of the record of the proceedings sought to be reviewed. The Third Respondent's application relates to the late filing of Heads of Arguments. The court considered both unopposed applications and hold that the non compliance is

condoned and shall not deal any further in this judgment with such applications. In both applications (condonation) the court is satisfied with the explanations and found no prejudice to be suffered by both parties.

The review application

[2] The grounds for review were set out to be the following:

- 2.1. The Second Respondent's arbitration award is reviewable in that he committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers as contemplated in section 145 of the Labour Relations Act and/or misconducted himself and committed a gross irregularity and/or failed to apply his mind to the matter in that inter alia:
- 2.2. he considered irrelevant evidence and ignored relevant evidence;

by finding the dismissal of the Second Applicant to have been fair in that the shortage of chicken boxes was at Hlatini hostel and that 105 boxes of chicken was found during stock count. The Second Respondent failed to discharge his duties as an arbitrator and analyse the evidence; he failed to afford the Second Applicant a fair trial of issues by overlooking his testimony that some of chicken boxes delivered at Hlatini hostel were unmarked; he ignored and/or dismissed the logical and most possible explanation that the investigators had failed to or did not mark all the chicken boxes as they were marking them on an already loaded truck;

- 2.3. his reasoning is flawed in that it was unreasonable of him to find that the 105 chicken boxes found at Lantern Supermarket were supposed to have been delivered at Hlatini hostel;

- 2.4. his findings that the driver had no way of separating the marked boxes from the unmarked ones is irregular in the circumstances of the case in that, he ought to have realised the possibility of the driver reloading the truck with extra boxes of chicken in order to balance his deliveries;

his ignorance of the Second Applicant's evidence raises a sense of shock and an impression that he was biased towards the Third Respondent;

- 2.5. he failed to realise and take into account the severe prejudice the Second Applicant would suffer as a result of his unfair decision;
- 2.6. he failed to take into account the fact that the probabilities favoured the Second Applicant and that there were no previous charges of any kind by the Third Respondent against his name;
- 2.7. he should have found it irregular for the Third Respondent to allege to have lost 68 marked boxes of chicken at Hlatini hostel and recover 103 boxes at the Supermarket.

The Applicant submits that the award of the Second Respondent should be reviewed and/or set aside in terms of section 145 of the Act.

Background facts

- [3] The Third Respondent got a wind that some of its employees in particular kitchen supervisors colluded with employees of Hoxies (supply of frozen food) to deliver reduced quantities of food ordered by the Third Respondent from Hoxies. In view thereof, on 25 August 2003, Willemse, Bekker (both employees of the Third Respondent) and Amod (employee of Hoxies) met for the purpose of marking consignment of frozen chicken due to be delivered by Hoxies to the Third Respondent's Hostel the following day with an

ultraviolet maker.

- [4] The said marker was not visible to a naked eye and could only be detected under an ultraviolet light. Every box of chicken in the delivery truck was marked and that process took Willemse and Bekker approximately one and half hour. Both Willemse and Bekker witnessed the loading of the chicken boxes in the delivery truck and had followed it throughout its delivering process. After deliveries at the hostels, the truck headed to Lantern Supermarket where it also delivered boxes of frozen chicken.
- [5] The driver a certain William confessed to the police in the presence of Bekker and Willemse that the short delivered boxes were bought from the kitchen supervisors at an amount of R25.00 per box and same was to be sold to Lantern Supermarket at R60.00 a box. The boxes were counted to be 102 and all of them marked with the ultraviolet mark. Lantern Supermarket was not a customer of Hoxies. On being confronted by Willemse and Bekker, the Second Applicant (Mahori) confirmed that he received 105 boxes of frozen chicken as per delivery note. In his fridge 115 boxes of chicken were found.
- [6] On inspection, only 37 boxes bore the ultraviolet mark. Mahori could not explain why 68 boxes did not bear the mark. 89 boxes were to be delivered at Etafeni hostel. On inspection, it was found that only 55 boxes bore the mark and there was a shortage of 34 boxes. There were no shortages at Numine hostel. In total the shortages amounted to 102 (68 from Hlatini and 34 from Etafeni). The Second Applicant was then charged with an act of dishonesty,

gross negligence and breaching of trust and dismissed.

The Arbitration Award

- [7] In the main, Mr Mbali for the Applicants argued that the conclusions arrived at by the Second Respondent were not supported by evidence and were largely irrational. In his award, the Second Respondent accepted the Third Respondent's version of events as being credible. He also gave reasons why he found as such. He further rejected the Second Applicant's version and equally gave reasons for that. He then made the following finding:

"I then find that the Applicant was indeed dishonest in that he knowingly signed for more boxes of chicken to have been delivered that (sic) what is actually the case".

He further found:

"As such I find the dismissal of Mr H J Mahori to be substantively fair".

- [8] On the issue of procedure, he made the following finding:

"Upon reading of the Respondent's behavioural code, I could not find any provision that prohibited an official from security department to act as a prosecutor in a disciplinary inquiry".

All these findings were perfectly supported by the evidence before him. The court finds no basis upon which his findings can be faulted. In fact an irresistible conclusion arise that based on the evidence most of which was not disputed the Second Applicant

indeed colluded with the Hoxies staff. That was dishonest given the position of the Second Applicant. His evidence that certain boxes were missed is nothing but a feeble excuse. The Second Respondent is correct in his finding that missing of boxes would have defeated the whole purpose of the exercise.

Conclusion

[9] In the premises the court is not persuaded that the award is reviewable. In fact the award is well reasoned and defensible in all material respect.

Order

I therefore make the following order:

1. Applications for Condonation are granted.

Application for review is hereby dismissed.

Each party to pay its own costs in relation to Condonation applications.

The First and Second Applicant to pay the Third Respondent's costs jointly and severally, the one paying absolving the other.

G N MOSHOANA
Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Mr Mbali
For the Respondent	: Adv Banes
Instructed by	: Leppan Beech Attorneys
Date of hearing	: 02\05\2007
Date of judgment	: 09\05\2007

