

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case number: JR623/2003

In the matter between:

MOROKA, DAVID THIVHULANI

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

JOWIE, TEFFO N.O

Second Respondent

SOLAR VISION (PTY) LTD

Third Respondent

JUDGEMENT

NGALWANA AJ

- [1] This is an application for the review and setting aside of an arbitration award made by the second respondent on 13 November 2002 under the auspices of the first respondent. In that award, the second respondent found that the applicant's dismissal was fair.

There is also an application for condonation for the late filing of this application which had been postponed on 25 April 2007 so as to be heard together with this application. Counsel for the third respondent did not baulk at the condonation and I see no reason for not granting it.

- [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] I am satisfied that none of the review grounds have been satisfied in this application. The applicant's contract of employment clearly states that the applicant "*will not be entitled, while in the employ of the company, to engage or be concerned in, or devote any time and attention to, any other business without the prior written consent of the company.*" In his own evidence at the arbitration hearing, the applicant conceded that he was working with Shimano Energy Store which was a business selling firewood, gas and paraffin. It is common cause that he never obtained the third respondent's prior written consent for doing so. The third respondent's business also includes the selling of liquid petroleum gas and paraffin. There can be no other reasonable sanction in my view than dismissal in these circumstances. It is clear that the sanction was given careful

thought by the second respondent with reference to Schedule 8 item 4 of the Code of Good Practice to the Labour Relations Act.

- [4] The application for condonation for late filing of the review application is granted. Application for review and setting aside of the second respondent's award is dismissed with costs.

Ngalwana AJ

For the applicant: *Mr MS Sikhwari*
Instructed by: *AR Madia Attorneys*

For the 3rd respondent: *Ms Liebenberg*
Instructed by: *LG Verveen Attorneys*

Date of hearing: *21 June 2007*

Date of judgment: *25 June 2007*