IN THE LABOUR COURT OF SOUTH AFRICA HELD AT
PORT ELIZABETH

Case no: P 534/06

In the matter between:

DANA SPICER AXLE (PTY) LTD Applicant

and

METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL First Respondent

COMMISSIONER HENRY SLATER Second Respondent

PORT ELIZABETH JUSTICE CENTRE Third Respondent

ANTON JOHAN SCHWARTZ Fourth Respondent

JUDGMENT

CELE AJ

Introduction

1]. This application is in terms of section 158(1)(g) of the LRA 66 of 1995, to review, set aside and to substitute an arbitration award dated 30 October 2006, issued by the second respondent, under the auspices of the first

respondent. The fourth respondent in whose favour the re-instatement award was issued opposed the application.

Background Facts

2]. The fourth respondent, Mr Schwarts, commenced employment with the applicant on 01 February 1996. In 2006 he held the position of a Project Control Superintendent, within the maintenance department of the applicant. He had authority to award tenders with the value which did not exceed R10 000.00. His work was governed by the Standard of Business Code (the Code) which stated, amongst others, that an employee could not receive money for giving work to a supplier. Simply put, his department and employees thereof were not to receive any favours as a precursor to the giving of work, that is, tenders to suppliers.

3]. The applicant had a zero tolerance policy concerning dishonesty with specific reference to ethical behaviour expected of its employees. All employees attended courses concerning ethics and the disciplinary code in 2005. The Dana Standard of Business Conduct Code was introduced in 2005 but it was an extension of previous codes of behaviour for the company. One, Mr Ryno Erasmus of Ryners Engineering specialising in

general steel works frequently contacted Mr Schwarts when he supplied quotes for tenders with the applicant. Mr Erasmus rendered some private work for Mr Schwarts and his neighbour. That involved the making of steel gates, repairing garage doors and the removal of garden refuse and moving furniture. Mr Erasmus himself received some items through or from Mr Schwarts. These included a fibre glass fish-pond, a lounge suite which he, in turn, sold in a second hand shop he was operating at the time and a belt sander. He never paid for those items nor did he invoice the applicant for any of the private work done by the applicant for him.

4]. A Mr Marius Delport of Trailrite also did business with the applicant through Mr Schwarts. He also had done some private jobs for Mr Schwarts. These included fixing the fish-pond and a computer. He provided material for the fish-pond but Mr Schwarts did not make a direct payment for it. Mr Delport supplied labour through two persons. Mr Schwarts frequently socialised with Messrs Delport and Erasmus and they would often have some *braais.*

5]. There is an occasion when Mr Delport and his manager, a Mr Andre Fourie, met a Mr Willemse, Mr Schwarts supervisor. Mr Delport reported to Mr

Willemse that he had done some favours for Mr Schwarts on the understanding that no tenders would be given to him by Mr Schwarts, if such favours on private work was not first done. Mr Williams undertook to revert back to Mr Delport on the report but did not. Instead, Mr Schwarts came to see Mr Delport on that day.

6]. The applicant subsequently preferred misconduct charges against Mr Schwarts described as:

> "That you illicited the irregular and/or corrupt receipt and/or intended receipt of services from selected suppliers of Spicer Axle SA (Pty) Ltd and accordingly breached the Dana Standard of Business Conduct Code and more specifically in that:
>
> *1.1 During 2004 you requested Trail-Rite to repair a fish-pond at your home;*
>
> *1.2 During 2004, you arranged for a computer to be delivered to Trail-Rite for repairs;*
>
> 1.3 *You requested and received labour free of charge from Rayners to install gates at your private residence."*

[7]. He was found to have committed the misconduct and was dismissed. He referred a dismissal dispute to the first respondent for conciliation and arbitration. The second respondent as the appointed arbitrator, found the dismissal to have been substantively unfair and

ordered the applicant to re-instate Mr Schwarts retrospectively. It is this order which the applicant seeks to have reviewed and set aside.

Review Grounds

[8]. The applicant placed reliance in its founding affidavit and in the heads of argument initially submitted by Mr Van Zyl of the applicant, on a defect in the arbitration award as defined in section 145 (2) (a) of the Act. In addition, it was submitted that the second respondent issued an award that was not rational when taking into account the body of evidence that was placed before him during the arbitration hearing. In the founding affidavit the applicant dealt with each paragraph of the analysis of evidence and argument by the second respondent to demonstrate how in its view, the second respondent's award was visited by defects.

[9] The submission by the fourth respondent was that no valid ground for review existed as the arbitrator did not commit any defect as described in section 145 (2) (a) of the Act. It was said that the arbitrator correctly applied his mind to all relevant evidence and reasonably concluded that the fourth respondent's dismissal was unfair. Further, the decision of the arbitrator did not have to be defensible in each and every aspect, but had to meet the objective standard of rationality in that it ought to reflect an attempt by him to consider the evidence before him and to arrive at a conclusion which is rationally related to the evidence which was before him. It was contended that the court could not interfere with the decisions simply because it

disagreed with it or if the court considered that the powers were exercised inappropriately. Nor would mere unhappiness with the conclusion reached by the arbitrator in an award be a valid ground for review.

[10] In his answering affidavit and in the heads of argument submitted on his behalf by Ms van Staden, the fourth respondent materially disputed the submissions made by the applicant. On the date of the hearing of this matter, Advocate Wade who appeared for the applicant applied, without opposition, to file supplementary heads of argument. He asked the court to dispose of the review application mainly on the basis of the submissions as were made in his supplementary heads of argument. The attack on the arbitration award by the applicant was then in the following terms;

a) While the rationality/justifiability test is no longer part of our law the applicant will seek to have the arbitrator's award reviewed and set aside on the basis that the arbitrator abrogated his fundamental responsibility to assess all the evidence and more over disregarded unchallenged evidence, thereby committing a gross irregularity in the conduct of the arbitration proceedings.
b) In giving brief reasons for the award, the arbitrator failed to deal with the issues that arose in the conflicting versions of the parties. Nor did he indicate which version he accepted and which he rejected. He ought to have given reasons for arriving at specific conclusions. He thus failed to resolve the following important factual disputes and issues:

    (i) Whether or not Schwartz had, in his dealing with

Erasmus, referred to so-called “PJF’s” (private jobs first) prior to discussing tender work and in a manner which clearly indicated that he would not open the order book unless an agreement was reached on private jobs.

(ii) The relevance, on the probabilities, of the fact that Erasmus was not challenged regarding various other private jobs he had undertaken on behalf of Schwartz.

(iii) Whether or not Schwartz has during the course of his interactions with Erasmus used the plainly incriminating words “PJF”, something which was denied during Erasmus’ cross-examination.

(iv) Whether or not Schwartz had in fact asked Delport to repair his internal fish pond, as opposed to first approaching Delport’s employee and thereafter making enquiries of Delport as to whether or not he could use him after hours.

(v) Whether or not, in relation to the repair of Schwartz’s fish pond, Delport had in fact supplied the material at no cost.

(vi) Whether or not Schwartz had in fact “requested” Delport to repair a friend’s computer, or whether the computer admittedly dropped off with Delport was a computer belonging to Schwartz’z son which Delport had voluntarily undertaken to repair.

(vii) The probabilities attendant upon the approach adopted by both Delport and Erasmus and, in particular, whether or not Delport acted as he did (by reporting the alleged misconduct) on account on “sour grapes”.

(viii) Whether or not Schwartz was truthful in suggesting that he believed he could do what he did.

c) Further, important to appreciate is the arbitrator's complete disregard of the fact that various important aspects of Mr Schwartz's evidence – upon which he relied – were never properly put to the applicant's witnesses for their comments, namely:

(i) The suggestion that in relation to the repair of the fish pond (by Delport) all the material was supplied by Schwartz.

(ii) That Erasmus was in fact requested to quote on the fabrication of the gates.

(iii) That in addition to the gates fabricated by him, Erasmus had performed various other tasks for Schwartz without receiving payment in respect there of.

(iv) That Delport in fact owed Schwartz's son money, thereby suggesting that that is why Delport voluntarily undertook to repair his son's computer.

(v) That in relation to the repair of the fish pond, Schwartz at no stage approached Delport but rather first approached Delport's employee, who undertook to assist him.

(vi) That either Erasmus or Delport had produced sub-standard work and that that represented the reason why he had ceased to utilize their services with the same degree of frequency.

d) Had the arbitrator properly applied his mind to the evidence-

with a view to resolving the important factual disputes-there is in truth no way of saying what he would have found regarding whether of not Schwartz misconducted himself. What is clear is that had he concluded that Schwartz acted in conflict of interest, the very real likelihood exists that he would have concluded that dismissal was in those circumstances a fair sanction. The simple fact of the matter is that in the majority of cases where employees have been found to have acted in conflict of interests, the sanction of dismissal has been approved of.

[12] The fourth respondent's submissions in contrast to those of the applicant are that:

a) All relevant and material aspects of the fourth respondent's version of events where in fact duly put to the relevant witness under cross-examination. The following aspects were highlighted:

    (i) Mr Erasmus' evidence was in fact duly challenged insofar as his reasons for termination of his relationship with the applicant were concerned. His version insofar as the "private job first" issue was also duly challenged.

    (ii) The relevant and material aspects of Mr Delport's evidence were duly challenged.

b) The arbitrator correctly applied his mind to all relevant and material evidence before him and arrived at a rational conclusion that the applicant failed to discharge the onus on it.

c) The relevant incident occurred in the year 2002. the invoice book pertaining to the year 2002 was however not even produced at the arbitration hearing.

d) The common cause fact remained that the fourth respondent never verbally and/or by way of any other means granted and/or withheld contracts from the specific parties in return for services. The applicant therefore failed to discharge the onus on it.

e) Other reasons in fact existed for the respective suppliers' decisions to terminate their relationship with the applicant and the fourth respondent.

f) The arbitrator committed no reviewable error by failing to record all the evidence in his award.

g) In light of evidence before the arbitrator, he correctly concluded that the applicant, in any event, condoned the fourth respondent's actions.

h) The arbitrator did comply with all his fundamental obligations in that he assessed the probabilities with reference to all the evidence. Having analysed the facts, he arrived at a well reasoned finding that the applicant failed to discharge the onus on it.

Analysis

[13] The review application before me is one in terms of section 158 (1) (g) of the Act which, simply stated, provides that this court may, subject to section 145, review the performance or purported performance of any function provided for in this Act on any ground that are permissible in law. Reliance has, in the main, been placed on section 145 of the Act for an allegation that the arbitration award of the second respondent is visited by a *defect*. In terms of section 145 (2) (a), referred to by the applicant, a defect means that the arbitrator:-

i) Committed misconduct in relation to the duties of

the arbitrator;

ii) Committed a gross irregularity in the conduct of the arbitration proceedings; or

iii) Exceeded the arbitrator's powers.

The main review ground is that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings.

[14] In respect of a gross irregularity it was held in *Ellis v Morgen; Ellis v Desai 1909 TS 576* that:

"[A gross irregularity] is one of the grounds upon which the court may review the decision of inferior tribunals. But an irregularity in proceeding does not mean an incorrect judgment; it refers not to the result, but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

[15] Further, in *Goldfields Investment Ltd & another v City Council of Johannesburg & another 1938 TPD 551 at 560* it was held that:

> "It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent……..Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice…… behaviour which is perfectly well intentioned and bona fide though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity……But if the mistake leads to the court's not merely missing or misunderstanding a point of law on the

merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of the language to say that the losing party has not had a fair trial."

[16] Mr Naude attacked the award on the basis of latent gross irregularities because of the reasons given by the second respondent. For the application to succeed the latent gross irregularities, if any, have to be such that they prevented a fair trial of the issues – see also *Toyota South Africa Motors (Pty) Ltd v Radebe & others [2000] 3 BLLR 243 LAC.*

[17] The second respondent identified facts which he found to have been common cause or uncontested by either party. He proceeded to utilise them in his resolution of facts in issue. He was clearly conscious of the fact that conflicting evidence existed which the parties failed to agree on. It then remained his duty or obligation as an arbitrator to resolve such issues. The proper approach in the resolution of such issues is one laid down in the decision of *Stellenbosch Farmers' Winery Group Limited & another v Mortel & Co 2003 (1) SA 11 (SCA)* at paragraph 5 which reads:

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too. On a number of peripheral areas of the dispute which may have a bearing on the probabilities. The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make finding on :(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding

on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' condour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incidents or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a) (b) and (c) the court will then, as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[18] In respect of some of the conflicting versions the second respondent indicated in his award which versions he accepted and which he rejected. However he failed to give reasons for arriving at such specific conclusions. In the absence of such reasons, even if one would have been brief, it can not be ascertained why he accepted one version and rejected the

other. Nor did he deal with the credibility and reliability of various factual witnesses in the resolution of their conflicting versions. He does not appear to have made an endeavour to consider and resolve the important factual disputes identified by the applicant in the supplementary submissions. There are aspects of Mr Schwartz's evidence which were not put to the applicant's witnesses for their comment. The second respondent ought to have placed no reliance on such aspects of evidence as he did. See *SA Nylon Printers (Pty) Ltd v Davids [1998] 2 BLLR 135 (LAC).* In my view, the applicant has not had it's case fully and fairly determined. Well intended as the approach of the second respondent was, it did in my finding, prevent a fair trial of the issues and therefore amounts to a gross irregularity.

Order:

In the result I make the following order:

(1) The arbitration award dated 30 October 2006, issued by the second respondent in this matter is reviewed and set aside.
(2) The matter is remitted to the first respondent for a *de novo* arbitration hearing before an arbitrator other than the second respondent.
(3) No costs order is made.

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CELE AJ

Acting Judge of the Labour Court

Date of Hearing: 12 December 2007

Date of Judgment:

APPEARANCES;

For the Applicant: Advocate R B Wade

Instructed by: Van Zyl's Inc.

For the Respondent: Ms E Van Staden form the Legal Aid Board