IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JR 1376/06

In the matter between:

MTSA (PTY) LTD **APPLICANT**

AND

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **FIRST RESPONDENT**

ADV R BRACKS **SECOND RESPONDENT**

HARVEY SIBUSISO RADEBE **THIRD RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

- This is an application to review and set aside an award dated 20 May 2006 issued under case number GAJB 8996-05. The key issue in this matter relates to the appropriateness of the sanction, the commissioner having found that the third respondent, herein referred to as "the employee" had breached the rule.

Background facts

- The employee who was employed by the applicant for a period exceeding 16 years was stationed at Ispot Iscor's Vanderbijl Park Steelworks (Iscor), a client of the applicant, was dismissed arising from an alleged misconduct.

- Iscor had a policy which applied to the employees of the applicant which governed the bringing in or removal of any item from its premises. The policy required employees to fill in a form known as B2100, before bringing in or removing any item from the premises. The signed form would be valid for a period of 30 days. After 30 days an employee would require an authorised gate release from one of the managers.

- "2008_66.rtf" (29 April 2008)

- It is common cause that the employee was on the 11 February 2005, found in possession of the 10 (ten) computer diskettes. It was alleged by the applicant that 4 (four) of the diskettes contained a scanner software used to scan and measure furnaces. The explanation proffered by the employee for being in

possession of the diskettes was that he found them in a rubbish bin outside the Iscor premises.

- The commissioner in the award recorded the evidence as being that the employee obtained the diskettes from a friend who found them in a bin outside Iscor. He then requested a certain Delizhlazo to check for him what was contained in the discs.

- There is conflicting versions regarding whether the discs were concealed at the time they were found by the security. The version of the employee which was accepted by the commissioner is that he did not conceal them but the security officer made a statement stating that he found the diskettes in the employee's bag at the point when he (the employee) was leaving Iscor premises.

- The charges proffered against the employee read as follows:

"1. Unauthorised possession of the company property.

2. Bringing company name into disrepute"

- The outcome of the disciplinary hearing was that the employee was dismissed for being found in *"authorised possession of company property."*

The award and grounds for review

- The applicant contended that there are glaring errors concerning

the recordal of the evidence by the commissioner. It is contended in this regard that the commissioner failed to appreciate the evidence before him and this contributed to his conclusion that the dismissal was unfair.

- The applicant contended that the summery of the evidence by the commissioner at paragraph G of his award was not the evidence led during the hearing. It was contended in this regard that it was never said that the employee was the only person who had access to the software in question.

- The applicant further contended that the commissioner incorrectly summarised the evidence relating to how the employee came into possession of the diskettes. The commissioner found that the employee had testified that the diskettes were found by a friend outside the premises of Iscor amongst magazines in a bin.

- The applicant argued that because of the incorrect recording of the evidence the commissioner laboured under the incorrect impression that the employee might have been a mere "by-stander". It was, according to the applicant, this failure to appreciate the evidence before him that led the commissioner to conclusion that the dismissal sanction was inappropriate.

- The other challenge to the commissioner's award, raised by the applicant relates to failure by the commissioner to conduct an inspection in loco to inspect the discs after undertaking to do so.

- In its supplementary affidavit the applicant contended that because, there was an element of dishonesty in the charges the commissioner should not have ordered reinstatement. The other complaint by the applicant is that the commissioner failed to give consideration to the fact that the explanation given by the employee for being in possession of the diskettes was highly improbable. The second point related to the issue that the commissioner failed to accord appropriate weight to the evidence before him particularly as concerning the version of the applicant that some of the diskettes contained software material scanner on Iscor. And the third point relates to the version of applicant that the diskettes were available only to Mr. Warren and the engineer on the Metal side.

- The re-instatement of the employee was also challenged as being inappropriate because Iscor, the client of the applicant had indicated that it no longer wanted him on its premises.

Test for review

- It seems prudent to deal firstly with the issue of whether incorrect recordal of the evidence amount to gross irregularity? It is not every error in law or fact that would render an arbitration award reviewable. It is gross error in law or fact that would vitiate an arbitration award.

- In my view incorrect recordal of the evidence did not materially or in any significant way affect the conclusion reached by the commissioner. The commissioner found the employee to have been guilty as charged and having arrived at this conclusion he proceeded to assess the appropriateness of the sanction.

- In **Z Sidumo v Rustenburg Platinum Mine Ltd 2008 (2) SA 24**, the Constitutional Court (the CC) developed the reasonable decision-maker test to be used in determining whether there is a basis for this Court to interfere with the decisions of the commissioners on review. In relation to the provisions of section 145 of the LRA the CC held that the provisions of this section were now "suffused" with the standard of reasonableness which

was previously set out in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490.**

- In terms of the reasonable decision-maker test the review Court would be entitled to interfere with the decision of the commissioner if it is found that the decision is one which a reasonable decision-maker could not reach. The reasonableness of the award is determined through the objective assessment of all the relevant factors and circumstances of each case.

- The critical issue, in the present instance, in my view, that determines whether the arbitration award is sustainable or not concerns what happened with the inspection in loco which the commissioner mooted toward the end of the proceedings.

- It is evidently clear from the reading of the transcribed record of the arbitration hearing that before adjourning the hearing the commissioner proposed to the parties that an inspection of what was contained in the diskettes be conducted. The parties agreed to the proposal but what then followed thereafter was a protracted discussion as to when such an inspection should be held. The record does not reveal whether there was an agreement as to the

date for the inspection and if there was no agreement what happened to the proposal itself. It is apparent that the understanding was that the inspection of what the diskettes contained was to be conducted at the applicant's premises.

[22] The other thing that the commissioner indicated was that after the inspection the parties would then be given the opportunity to make their closing arguments. The inspection of the diskettes did not take place but the parties did make their closing arguments which as indicated earlier were supposed to take place after the inspection. There is no indication that the applicant's representative raised an objection or concern about the fact that the closing argument was happening before the inspection of the diskettes. There is also no indication that the applicant indicated that it wished to have the issue of the inspection pursued after the closing argument, before the commissioner could issue his award.

[23] It seems to me that the applicant was either, not interested or did not regard the inspection as an important part of its case. As indicated earlier there is nothing in the record that sheds light as to what happened to the inspection in loco after the parties agreed with the proposal of the commissioner. In its papers the applicant

raises the issue without indicating what the final conclusion was after the parties agreed to the proposal. The applicant has also not made out a case as to in what way it was prejudiced by failure of the commissioner to conduct the inspection.

[24] The issue that arises from the complaint about failure to conduct inspection in loco by commissioner relates in my view to the method or mistaken action taken by the commissioner in the manner in which he conducted the arbitration hearing and not the correctness of his decision.

[25] Thus the critical question is whether by failing to conduct the inspection in loco the commissioner denied the applicant a fair hearing of the issues. If it did prevent a hearing on the aspect related to the contents of the of the diskettes then it would, as it was held in **Goldfield Investments Ltd and Another v City of Johannesburg 1938 TPD 551**, amount to a gross irregularity. It would be an irregularity upon which, as was found in **Ellis v Morgan v Desai 1909 TS 576**, the Court would be entitled to review and set aside the decision of the commissioner. **See also Coetzee v Lebea NO and Another (1999) 20 ILJ 129 (LC).**

[26] I have already indicated that the applicant has not made out a case showing that failure to conduct an inspection in loco prejudiced it and in what manner. An assessment of what could have been the purpose of the inspection in loco, also does not reveal any possibility that the applicant was prejudiced by the failure of the commissioner to carry out the inspection.

[27] The issues for determination by the commissioner were essentially common cause. The issues related to whether the employee was guilty of failure to follow procedure in bringing property into Iscor's premises and whether this conduct brought the name of the applicant into disrepute. In as far as these issues are concerned I am satisfied that the commissioner gave the parties a fair trial. In the result it can therefore not be said that the commissioner committed a gross irregularity in failing to conduct the inspection in loco.

[28] Turning to the broad aspects of this review, I am of the view that the commissioner arrived at a decision which a reasonable decision-maker could reach. I have already indicated above that having found the employee guilty what was left for the commissioner was to determine the fairness of the sanction.

[29] The power to determine the fairness of the sanction rests with the commissioner. In exercising this power the commissioner after examining the fairness of the sanction imposed by the applicant reached the conclusion that the sanction was unfair. In this regard the commissioner took into account the fact that the employee had 16 years of a clean disciplinary record. It is also apparent from the record that the commissioner rejected the version of the applicant that the diskettes were in the bag of the employee. In other words the breach of the rule was not accompanied by an act of dishonesty. Implicit in this finding is that the applicant did not proof the element of dishonesty which if proven would have compelled the commissioner to arrive at a different conclusion in his assessment of the appropriateness of the sanction.

[30] In the absence of proof of dishonesty and having regard to the facts and circumstances of this case, I do not belief that it can be said that the decision of the commissioner was unreasonable.

[31] The issue of Iscor having indicated that it no longer wish to have the employee on their premises does not in view have any bearing

on the reasonableness of the decision of the commissioner. There was no evidence in this regard that indicated that the employment of the employee was subject to him being placed at Iscor and not at any other side of the applicant.

Conclusion

[32] In my view the applicant has failed to show that the sanction which it had imposed was fair and therefore failed to establish a basis upon which this Court could interfere with the decision of the commissioner. Accordingly the application stands to be dismissed. I see no reason why the cost should not follow the results.

[33] In the premise the application to review and set aside the arbitration award of the second respondent dated 20 May 2006 and issued under case number GAJB 8996-05 is dismissed with costs.

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Molahlehi J

Date of Judgment: 29 APRIL 2008

Date of Hearing: 05 December 2008

APPEARANCES

For the Applicant: D J GREYLING INC

For the Respondent: C/O ALLARDYCE & PARTNERS