IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

REPORTABLE

CASE NO: D352/06

In the matter between:

ADCAN MARINE	APPLICANT
AND	
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	1ST RESPONDENT
COMMISSIONER PAUL SHABANGU N.O.	2ND RESPONDENT
VUSI GOODHOPE THETWAYO	3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under case number KNRB345-06 dated 2nd June 2006. In terms of the arbitration award the Commissioner found the dismissal of the Third Respondent (the employee) to have been unfair and ordered his reinstatement with back pay.

[2] The employee applied for condonation for the late filing of his opposing affidavit. The Applicant has abandoned its opposition to the late filing of the opposing affidavit. In my view the period of the delay in filing the opposing

affidavit was not excessive and the explanation for delay is also acceptable. Accordingly the late filing of the answering affidavit stands to be condoned.

Background facts

[3] The business of the applicant involves delivery of fresh and frozen products to a number of clients. The applicant indicated during the arbitration hearing that over a period of several months it had received complaints from its clients about incorrect and short deliveries of goods ordered. The major concern was mainly with regard to cheese and polony products.

[4] Because of several complaints received from clients on the route done by the employee the Applicant decided, after a solution to the problem could not be found, to set up a trap on the employee's route. The trap was set by Mr Stamatis (Stamatis), the manager at Richards Bay branch.

[5] Stamatis testified that the night prior to the entrapment taking effect, he together with another manager remained behind after the trucks had been loaded. He then took two blocks of cheese after the trucks were loaded and placed one of them in the truck to be driven the following day by the employee and the other in another truck doing a different route to that the of the employee. Both trucks were locked and the following morning whilst supervising the further loading of frozen goods he check in the presence of two other employees and confirmed that the cheese was still there. It would appear that an extra cheese was loaded on a third truck which was also doing a different route to that of the employee.

[6] The employee returned earlier than the others because of the small load he had to deliver on that day. On arrival of the employee Stamatis approached his truck

to check whether the cheese was still there. The cheese was not there and when asked what happened to it the employee denied knowledge thereof. However when informed that a disciplinary hearing would be convened the employee, according to Stamatis, blamed the disappearance of the cheese on his assistant.

[7] Thereafter, Stamatis indicated to the employee that he would require him to under go a polygraph test which he initially seems to have been willing to undergo but did not turn up on the day which was set for the test to be conducted.

[8] The employee's case is that he was not made aware of the extra block of cheese which was allegedly loaded on his truck. On the day in question he was given a contractor as his assistant and was told that the reason for this was because his load was small.

[9] The employee testified that he only saw Stamatis on Monday when he approached him regarding his leave. He apparently wanted to sell some of his leave days to the Applicant and only take leave in January. An argument then developed between the two of them as to when the employee was entitled to leave. According to the employee Stamatis told him that he should have by then taken his leave and that he would be entitled to take leave in terms of the law only in May the following year.

[10] In relation to the loading of the truck in the morning the employee testified that his truck was not locked and denied having checked the stock with Stamatis before the truck was dispatched. After loading the baby hakes the dispatch of the truck was authorised by Mr Jethro Stamatis.

Grounds for review and the award

[11] The applicant in its found affidavit set out the grounds for review as follows:

"(i) The Second Respondent committed misconduct in relation to the duties of the Commissioner as an arbitrator, alternatively committed a gross irregularity in the conduct of the arbitration proceedings in that he ignored and misapplied legal principles relating to the making of the award. The Second Respondent failed to take into consideration the balance of probabilities which favoured the Applicant in these proceedings and in particular made an error in interpretation of the evidence presented by the Applicant, the Respondent in the arbitration proceedings, and in particular misdirected himself in the interpretation of the version given by the Third Respondent in the arbitration proceedings.

(ii) The Commissioner in consideration of the award failed to apply his mind to the Applicant's and his witness' evidence in the pursuance of the arbitration proceedings at the time of the arbitration hearing and in particular, did not consider unchallenged evidence presented by the Applicant and his witnesses.

(iii) I therefore submit that the Second Respondent's finding that the Respondent is to be reinstated and is entitled to compensation to the extend of R4966.00 as not supported by the evidence or legal principles and was further not justifiable in relation to the reasons given for it."

[12] During argument Advocate Posemann, for the applicant argued that the facts of the case was very simple and what was required of the Commissioner was to

determine whether on the balance of probabilities that the dismissal was unfair. She argued that instead of assessing the probabilities the Commissioner simply looked only at the possibility that the assistant may have removed the cheese. This possibility was not feasible according to her because the assistant could not have known what was written on the invoice. It was on the basis of the above that she contended that the decision of the Commissioner is one which a reasonable decision-maker could not have reached.

[13] In seeking to show knowledge of the presence of the cheese on the employees truck and involvement in the disappearance of the cheese by the employee, Advocate Posemann relied on the testimony of Stamatis where he stated that initially the employee denied having seen the cheese but later complained that he was accused of stealing the cheese. In this regard it is said that the employee then blamed the assistant. It seems to me that this argument sought to infer inconsistency in the testimony the employee and draw an inference upon which a conclusion can be drawn that the reason for the inconsistency was because the employee knew what happened to the cheese.

[14] It is evidently clear that the applicant relied on the circumstantial evidence in seeking to prove that the employee was responsible for the disappearance of the cheese which was placed on his truck in his absence the previous night.

[15] In the case on *National Union of Mineworkers v Commission for Conciliation, Mediation and Arbitration and Others (2007) 28 ILJ 1614 (LC),* this Court relying on the authorities cited in that case held that the onus in civil cases where the case is based on circumstantial evidence is discharged if the inference to be

drawn is the most readily and acceptable inference from a number of possible inferences. Because of the risk inherent in relying on an inference drawn from circumstantial evidence, it is always important to ensure that a distinction is drawn between a permissible inference and a mere conjuncture. See *AA Onderlinge Assuransie-Associasie Bpk v De Beer* 1982 (2) SA 603 (A) and *Victor and Another v Picardi D Rebel* (2008) 26 ILJ 2469 (CCMA). The reason for this cautionary approach is stated by Hoffman v Zeffert in South African Law of Evidence (5 Ed) at page 93 as follows:

> *"The possibility of error in direct evidence lies in the fact that the witness may be mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference that it draws may be sequitur, it may overlook the possibility of other inferences which are equally probably or reasonable possible. It sometimes happens that the trier of facts at having thought at a theory to explain the facts may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred."*

[16] An inference from circumstantial evidence can only be drawn if there exist objective facts from which to infer other facts which is sought to be established. See *Caswell v Powell Duffry Associated Collieries Ltd [1939] 3 All E.R. 722 (HL).*

[17] Turning to the facts of the present case I have already indicated that the case of the applicant is that the award is reviewable because the Commissioner considered only the possibility that the assistant driver could have taken the cheese.

[18] In my view the Commissioner cannot be faulted for adopting the approach he did when determining whether there was a basis for drawing an inference that the employee was responsible for the disappearance of the cheese.

[19] The facts and the circumstances of this case are distinguishable from those which the Court was faced with in *Aluminium City (Pty) Ltd v Metal & Engineering Industries Bargaining Council & Others (2006) 27 ILJ 2567 (LC)*. In that case the arbitrator was faced with having to draw an inference from the circumstantial evidence where one of the 18 pallets which were on the truck went missing and the driver and his assistant could not account for them. The critical fact distinguishing that case from the present one is that in that case the Court found that the employee was present during the loading, transportation and off-loading of the pallets. It was common cause that 17 pallets were delivered to the client. The Court found that once the employer had proved a prima facie case that 18 pallets had left the premises, and the driver and his assistant were aware of the presence, the evidenciary burden of giving a credible explanation as to what happened to the 18th pallet rested with the employee. Once the employee failed to provide a credible explanation for the disappearance of the pallet the *prima facie* case had to prevail and it be taken that the employer party had established its case.

[20] The driver in the *Aluminum City (Pty) Ltd v NUMSA obo Pheneous Buthelezi unreported case number JR1812/05* was charged later with the disappearance of the 18th pallet. On review this Court dealing with the issue of drawing an inference about the missing pallet had this to say:

> *"[18] When faced with having to assess circumstantial evidence an arbitrator should always consider the cumulative effect of all items of evidence before him or her. In other words the arbitrator should look at the totality of the evidence and weigh it on a balance of probabilities. See Zeffertt at 99 LAWSA, Vol 9 (1st issue) at paragraph 643. See also SA Nylon Printers Pty Ltd v Daniels (1998) 2 BLLR 135 (LAC) AT 1369."*

[21] The Court went further to say:

> *"In my view the commissioner should have found that the cumulative effect of the whole evidence before her was that a prima facie case of misconduct on the part of the employee was established. The next assessment which the commissioner needed to conduct was whether the explanation tendered by the employee, offered on the balance of probabilities a credible explanation in response to the said prima facie case of misconduct."*

[22] In my view in the present instance the employer did not discharge its duty of establishing a *prima facie* case which would then have called upon the employee to provide an explanation as to what happened to the cheese. There are a number

of possibilities that indicate that the employee was not the only person who could have been responsible for the disappearance of the cheese.

[23] The one possibility which the commissioner considered and accepted as plausible is that the assistant could not be ruled out in the disappearance of the cheese. The commissioner cannot be faulted for deciding to resolve the issues before him on the basis of this possibility alone regard being had to the provisions of Section 138 of the Act. Section 138 of the Act gives the commissioner the power to conduct the arbitration proceedings in the manner in which he or she considers appropriate in order to determine the substance of the dispute fairly and quickly but must deal with the substantial merits of the disputes with the minimum legal formalities.

[24] Before proceeding to deal with other possibilities that may exist in as far as the cheese in question is concerned, I need to pause and deal very briefly with the test for review as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 12 BLLR 1097 (CC)*. The test for review as set out in *Sidumo* is that of a reasonable decision-maker. In applying this test on review the question to answer is whether the decision of the Commissioner is one which a reasonable decision-maker could not reach.

[25] I agree with Mr Jafta for the employee that there are many possibilities which the employer has failed to eliminate by way of evidence in connection with the issue of the missing cheese. There are number of other people who could be linked to the disappearance of the cheese if it was at all placed in the truck. One of them is the security guard who it would appear would have arrived on the

premises after the cheese was placed in the employee's truck. There is no evidence to show that he could not have had access to the employee's truck. The number of people who were involved in the entrapment process is also an important factor to look into. In this regard the testimony of the employee which seem not to have been challenged is that in the morning when he arrived his truck was not locked. Therefore the possibility that the cheese may, have disappeared over night cannot be ruled out.

[26] The possibility that the cheese was not there when the employee arrived in the morning and could have been removed, is supported by the version of the driver's assistant who says he never saw the cheese. This version has not been contradicted. The one person who could have assisted in this regard is the driver assistant who accompanied the employee on that day. The applicant did not call him as a witness to testify as to whether he saw the cheese in question on that day. His evidence was critical to assist in indicating whether or not the he saw the cheese on that day be it in the morning or during the delivery. Thus the probabilities points strongly towards the version that the cheese was not on the truck in the morning. The employee was also not present in the morning when the frozen stock was loaded according to Mr Le Roux one of the witnesses of the applicant. Related to the above is also the possibility that one of those who had been involved in the entrapment may have removed the cheese to ensure that the employee comes back without the cheese and therefore the trap is guaranteed to succeed.

[27] It is also common cause that the assistant was new in the employment of the respondent. There is no evidence indicating the experience of the assistant in relation to assisting with delivery of stock. The possibility of him having taken incorrect stock during the delivery including the cheese cannot be ruled out.

[28] The fact that the driver was responsible for the delivery does not in my view make him responsible for goods he was never made aware of.

[29] In the circumstances of this case, my view is that the applicant has failed to make out a case for the review of the decision of the Commissioner. I have considered the facts and the circumstances of this case, and come to the conclusion that fairness requires that costs should follow the results.

[30] In the premises the application to review and set aside the arbitration award of the Second Respondent under case number KNRB 345-06 dated 2nd June 2006 is dismissed with costs.

Molahlehi J

Date of Hearing : 7th November 2008

Date of Judgment : 19th March 2009

Appearances

For the Applicant : Adv M M Posemann

Instructed by : Riaan Kruger Attorneys

For the Respondent: Mr Jafter of Jafta Incorporated