

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT PORT ELIZABETH)**

CASE NO: P 374/2008

In the matter between:

FAWU obo DESMOND JACOBS

Applicant

and

COCA COLA (Pty) Ltd

1st Respondent

COMMISSIONER MABENGE N.O.

2nd Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

3rd Respondent

JUDGMENT

LAGRANGE,AJ

Introduction

1. This is a review application brought by a union on behalf of a member Mr Jacobs whose dismissal was found to have been substantially and procedurally fair by the commissioner. Mr Jacobs had been dismissed on 16 October 2007 for bringing his company's reputation into disrepute.
2. Mr Jacobs was involved in an altercation with a member of the public, Ms Mason, whose car he had parked in with the delivery vehicle he was driving and who had asked him to move his truck. In the course of the altercation he swore at the woman,

according to the findings of both the disciplinary enquiry chairperson and the commissioner.

3. The company called two witnesses. The first was Ms Barthop friend of Ms Mason who was with her at the time of the incident. She gave her own eyewitness account of what transpired between Jacobs and Mason. The second witness was Mr Human a truck assistant who was busy offloading the truck at the time. Human could not say he witnessed all the interaction between Mason and Jacobs but did hear Jacobs say to Mason “Suka, the land does not belong to you boere” or words to that effect. He also testified that Jacobs had been rude on another occasion. According to Ms Barthop, Mason had requested Jacobs to move his vehicle so she could leave, but he did not respond positively to her request and called her friend a “fucking white racist bitch”, when she remonstrated with him. Mr Bester, a manager of the applicant, testified how the complaint came to reach his ears after the company’s chief accountant had referred the matter to him. Bester also testified on the importance of all employees presenting a good image of the company in public and that Jacobs had previously been counseled over another incident or rudeness involving a manager of a Spar outlet that was a customer of the firm.
4. Jacobs called another truck assistant, Mr Zana, as a witness. Zana had previously made a written statement to the company which implicated Jacobs but he repudiated this statement when he was called by management to testify at the disciplinary enquiry. Zana was aware that Mason was unable to move her car, and he claimed he had asked Jacobs to do so. Zana agreed he was not present all the time as he was offloading on the other side of the truck and did not hear any argument, though it could have happened. Jacobs own account was essentially that he politely agreed to move his vehicle when Mason had requested him to do so, but that the two women had been rude to him.

The Arbitrator’s award

5. The arbitrator briefly narrated the evidence with some inaccuracies and evaluated the evidence. She discounted the significance of Zana's evidence as he could not say there had been no argument. The arbitrator also noted that Jacobs' own evidence was that the two women had been rude to him which did not square with Zana's testimony about a cordial interaction.
6. The arbitrator concluded that Jacobs' dismissal was justified on the basis of the previous incident involving a Spar manager, which Jacobs had not disputed, and the altercation with Mason.

The Grounds of Review

7. A number of grounds of review were raised by the applicant, most of them concerning the reliance on Barthorp's testimony.
8. The complaints in relation to Barthops testimony are that:
 - 8.1. Barthop was not the party who was the alleged target of Jacobs' abusive language;
 - 8.2. Mason ought to have testified but did not and no reason was given why she was not called as a witness, and
 - 8.3. Barthop's testimony of what was said was not the same as what Human alleged he heard.
9. The other ground of review was that the arbitrator unduly deferred to the employer's witnesses' account of events and gave insufficient consideration to Jacobs' witnesses.
10. It seems that the applicant was of the view that Mason as the party who was allegedly insulted should have given evidence herself. However, Barthop's testimony was that of an eyewitness to the incident and she could be questioned on the accuracy of her recollection. It seems Mason had indicated she was unwilling to testify at the disciplinary enquiry stage and the company did not attempt to subpoena her to give evidence at the arbitration proceedings. It is true Mason's evidence might have

confirmed Barthop's testimony, but the failure to call her was not strictly necessary for the company's case. It was also irrelevant that Jacobs' remarks had not been directed against Barthop. As an eyewitness to the incident she was not precluded from giving evidence just because she was not personally insulted. The nature of the comments allegedly made were obviously hostile and abusive in character and did not require the testimony of the injured party to confirm that.

11. It is correct that Human's account of what Jacobs had said to Mason concerned a different insult. However, Human had conceded he was not present during all the interaction between Barthop and Jacobs, and it is not clear that Barthop witnessed the all of the interaction between her friend and Jacobs, though she did claim to hear the insult she recounted and heard Mason pleading with Jacobs to move his vehicle.
12. Moreover, on all accounts it is clear that Jacobs' vehicle was blocking Mason's exit path from her parking space and that she had engaged with Jacobs about moving the vehicle. At the arbitration, Human's version was not challenged and it was only at the arbitration that Jacobs sought to impugn his testimony by suggesting he had a motive to implicate him, whereas one might have expected this to have surfaced at the internal inquiry as well if there was some substance to it. Further, none of the company's witnesses were confronted with the version of events as portrayed by Jacobs which seriously diminishes the value of his own evidence because it was never really tested with those witnesses who might have been able to contradict him. Bester's account of the previous incident involving a Spar manager which resulted in counseling of Jacobs was also not disputed by Jacobs. Lastly, there was no evidentiary basis for suggesting that Barthop had any reason to concoct a story against Jacobs who was a complete stranger to both of them before the incident occurred.
13. In the circumstances there seem to be good grounds for the commissioner having preferred the company's version of events to that of the applicant, and even though the arbitrator could have set out her reasoning in more detail, her evaluation of the evidence based on what she set out in the award cannot said to be unreasonable.

Certainly, I am not persuaded that the line of reasoning in her award is one that no reasonable arbitrator could have adopted.

Conclusion

14. Accordingly,

14.1. the application to review and set aside the commissioner's award is dismissed, and

14.2. no order is made as to costs.



ROBERT LAGRANGE

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 4 March 2010

Date of judgment: 23 March 2010

Appearances:

For the applicant: Mr B Macingwane of FAWU

For the respondent: Mr R Wade, instructed by Chris Baker & Associates