Not reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 289/05

In the matter between:

BOSASA OPERATIONS (PTY) LTD

T/A HORIZON YOUTH CENTRE **Applicant**

and

NEHAWU **First respondent**

CCMA **Second respondent**

STEPHEN BHANA N.O. **Third respondent**

MH SIBELEKWANE **Fourth respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an application to review and set aside the arbitration award of the third respondent (the arbitrator) handed down on 17 May 2005. Following the dismissal of the fourth respondent, MH Sibelekwane (the employee) by the applicant, the arbitrator found the dismissal to be substantively unfair. He ordered the applicant to reinstate the employee retrospectively to the date of his dismissal on 25 October 2004.

BACKGROUND FACTS

[2] The applicant, a youth centre, employed the employee as a care worker. In a disciplinary enquiry, the applicant found that the employee had assaulted a youth[1] in his care, one Justin Karolus, by “tramping"[2] on his head.

[3] The arbitrator found that the youth had contradicted himself in the arbitration and in his evidence at the disciplinary enquiry (as per the minutes of that enquiry). The arbitrator found that he was not a credible witness. In contrast, he found that the employee's testimony was consistent and that he had shown remorse for the incident. On a balance of probabilities, the arbitrator found that the employee had accidentally inflicted an injury on the youth.

[4] It is common cause that there was a scuffle on the day of the incident. The youth refused to go to class and tried to hide away. The employee and another co-worker had forcibly taken him to the welding classroom. The youth resisted going inside and the employee tried to push him. The youth fell to the floor and sustained an injury on his head. The applicant says that the employee had "tramped" on his head, thus causing the injury. The employee does not deny that his feet landed on the youth’s head, but testified that it was not intentional and that he lost his balance and fell on top of the youth in the scuffle.

[5] In his evidence at arbitration, the employee described the incident as follows[3]:

> "When we reached the… class, we had to knock at the door because the door was closed and it was locked. Then the educator opened the door and ... we said, ‘Please, don't want to force you, go inside.' Justin said 'I will not go in.' So

---

1 Although it was not clear from the record, I was informed from the bar that Karolus was about 16 years old at the time of the incident.

2 It appears that Caruso's evidence at arbitration may have been partly the Afrikaans and that it was translated into English. The word "tramp" in this context appears to have been an attempt at translating the Afrikaans "trap”, resulting in a mixture of "trample" and "stamped".

3 Grammar as per the transcript.

> we try and push him. He don't want to go. Then we push him and when we push him he… with my tie and my jacket. Just because I leaned forward then I lose my balance then I just saw my feet lying on top of his head… As we saw then we saw the blood on the side of the head."

[6] The employee reputed essentially the same version of events in cross-examination.

[7] The youth testified as follows in his examination in chief:

> "When we arrived at the classroom I refused to go in and the… instructor then opened the door and he [the employee] pushed me in and then I fell. I then got up and I wanted to run outside, then he got hold of me again and he threw me to the ground. Then he *smacked* [4] me twice on my head. Then I kept lying down and I was bleeding and I was lined on the whole time. "

[8] When his representative asked him, "How did you get injured on your head?" the youth replied, "When I fell to the ground I injured my head." In cross-examination, he said that the employee" tramped" twice on his head.

[9] The applicant's main witness, Juliana Williams, testified that no physical assault was allowed. However, she differed with another member of the managerial staff, Nuxolo Malindi, as to what constituted minimum force.

[10] Malindi, who was present when Williams and the nurse who treated the youth, Theresa Sixaba, testified, stated that the head wound was a "deepish cut". Sixaba, on the other hand, testified that it was a "small bruise". She was adamant that there was no cut and that it was not bleeding.

THE AWARD

[11] The arbitrator found that the applicant's witnesses had contradicted one another on crucial issues. He found that the youth had contradicted himself and was not a credible witness. In contrast, the evidence of the employee was consistent.

---

[4] My emphasis

[12] The arbitrator referred to the following *dictum* in *Plaatjies & another v Road Accident Fund*[5]*:*

> "In this matter we are dealing with two mutually destructive versions. A plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of credibility of the witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the probabilities favour the plaintiff, then the court will accept his version is being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and the defendant's version is false."

[13] The arbitrator found that the version of the employee was the more probable one. Given that the applicant bears the onus of showing that the dismissal was fair, the arbitrator found that the applicant has not discharged the onus and he found the dismissal to be substantively unfair.

GROUNDS FOR REVIEW?

[14] The applicant submits that the arbitrator disregarded the rules of evidence and in that way denied the applicant a proper hearing. Mr Campanella, for the applicant, argued that the employee's version of events was improbable.

[15] In this regard, I must bear in mind that this is a review, not an appeal. The arbitrator has the advantage of observing the witness before him and he was in the best position to make a finding as to their credibility.

[16] Having considered the evidence of the various witnesses in the transcript of the arbitration hearing, I am not persuaded that the arbitrator's findings on credibility were unreasonable. They were indeed contradictions between the applicant's witnesses *inter se* and in the different versions proffered by the youth. The evidence of the employee, on the other hand,

---

[5] [1999] 1 AllSA 168

remained consistent. His version of events is not so improbable that a reasonable arbitrator could not have found that that it was convincing.

[17] The decision of the arbitrator was not so unreasonable that no reasonable commissioner could have come to the same conclusion.

RELIEF

[18] Mr Campanella submitted that, if I were not inclined to grant the application for review, I should nevertheless take into account the time that has passed since the dismissal and order the applicant to compensate rather than reinstate the employee. I do not agree that I have the power to do that. If the application for review is dismissed, the award stands. It is not entirely clear why it has taken more than five years from the date of the arbitration award for the review application to reach this court. However, the employer is not blameless. The award was handed down on 17 May 2005. The applicant only filed its supplementary affidavit in terms of rule 7A(8) more than two years later, in August 2007. An employer who chooses to take an arbitration award on review and fails to prosecute it timeously as contemplated in the time periods set out in rule 7A runs the risk of the implications, should the review application be dismissed.

COSTS

[19] The effect of this judgement is that the arbitration award stands and that the employee must be reinstated. He will have to forge a fresh employment relationship with the employer. His trade union, Nehawu (the first respondent) also has a continuing relationship with the applicant. In those circumstances, I do not deem it appropriate to make a costs order.

ORDER

[20] The application for review is dismissed. There is no order as to costs.

_____

ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

CAPE TOWN

Date of hearing:	17 November 2010
Date of judgment:	26 November 2010
For the applicants:	Adv Joe Campanella
Instructed by:	L Cirone attorneys
For the third respondent:	Attorney N Thaanyane