REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

## JUDGMENT

Case no: C 862/10

In the matter between:

**STRATEGIC LIQUOR SERVICES CC**

**T/A BEVERAGE MERCHANDISING & PROMOTIONS** **Applicant**

and

**THUTHUZELA NDZOMBANE N.O.** **First respondent**

**CCMA** **Second respondent**

**SOLIDARITY obo AJ HUMAN** **Third respondent**

**Heard**: **24 November 2011**
**Delivered**: **9 December 2011**
**Summary:** Review – process related – hearsay evidence.

---

**JUDGMENT**

---

STEENKAMP J

Introduction

[1] The third respondent, Mr AJ Human (“ the employee") was dismissed for misconduct , comprising gross negligence in failing to resolve complaints; and alleged dishonesty by providing false information to the applicant's biggest (in fact, its only) customer, South African Breweries (SAB).

[2] The employee referred an unfair dismissal dispute to the CCMA (the second respondent). The first respondent (the arbitrator) found that the applicant had not discharged the onus to show that the employee had been guilty of misconduct. He awarded the employee six months' compensation.

[3] The applicant seeks to have that award reviewed and set aside. The crisp question is whether the arbitrator properly found that the applicant had relied mainly on hearsay evidence; and that this was not sufficient for the applicant to discharge the onus to show that the dismissal was fair. The applicant argues that, in doing so, the arbitrator did not properly discharge his duties; and that the resultant conclusion that he came to was so unreasonable that no other arbitrator could have come to the same conclusion. The applicant’s complaint is directed at the process rather than the outcome of the arbitration proceedings.

Background

[4] The applicant provides outsourced merchandising services to SAB. The employee was a senior merchandiser in the Cape inland region. He was responsible for managing the merchandising of a number of liquor outlets on behalf of SAB.

[5] In the period June to August 2008 Daniel Deetlefs, an account manager of SAB, allegedly raised a number of complaints about the employee’s performance and his alleged failure to carry out certain duties.

[6] As a result, the applicant conducted a work performance discussion with the employee on 18 September 2008.

[7] On 17 October 2008 the applicant issued the employee with a notice to attend a disciplinary enquiry. It alleged that SAB was still complaining that the employee had not addressed the issues raised in his performance hearing; and that the employee had been dishonest in that he gave false information to SAB by confirming that promotions had been implemented in various liquor outlets whilst they were not.

[8] The alleged misconduct leading to the disciplinary enquiry was listed as gross negligence in the execution of his duties and dishonesty. The hearing was held on 20 October 2010 and the employee was dismissed. He referred an unfair dismissal dispute to the CCMA and the arbitration took place on 24 June 2010.

The award

[9] The applicant's basis for disciplining the employee was the alleged complaints received from SAB, and specifically Deetlefs. At the arbitration, only the applicant's district manager, Stephen du Preez, testified on behalf of the applicant. He did not call Deetlefs or any other SAB representative to give evidence. The employee testified on his own behalf.

[10] Having considered these two versions, the arbitrator came to the following conclusion:

> "Having considered the evidence I have concluded that the [company] has not proved on a balance of probabilities that the [employee] had committed an act of misconduct. The [company] relied on hearsay evidence which was countered by direct evidence of the [employee].
>
> I find that the hearsay evidence was not sufficient for the [company] to discharge the onus that the dismissal was fair."

[11] The arbitrator thus found that the dismissal was unfair and he awarded the employee six months' compensation.

Grounds for review

[12] The applicant takes issue with the way in which the arbitrator conducted the arbitration proceedings. It argues that, when the arbitrator realised that Du Preez's evidence was based on hearsay, he should have taken a more active inquisitorial role and he should have explained to Du Preez that he would need to call Deetlefs as a witness in order to prove his case.

[13] The applicant argues that the arbitrator misconducted himself in the discharge of his duties, thus preventing a fair trial and making his award reviewable.

[14] At the outset of his award, the arbitrator notes the following:

> "During the arbitration proceedings it appeared that some of the evidence of the parties was grey and I extended to the parties to call further witnesses if they so wish but parties decided to conclude their respective cases."

[15] This comment appears to relate to the following remarks made by the arbitrator after the two witnesses had concluded their evidence:

> "... and Daniel [Deetlefs] have seen all (inaudible). I'm not sure whether in the process you might consider calling him, I'm not saying you must call him, I'm not sure whether you might consider calling him. On the side of the company, on the basis that there were initial e-mails or complaints and it appears that when you addressed with the applicant there is no other (inaudible) instead, you had a meeting with the bosses of SAB and they would come with that information today, and then I am not sure whether you are going to consider calling those witnesses, I'm not sure, but it's up to you, I'm just giving that indication that you still open to those ones. Or are you going to say no, forget about these two witnesses, information that is before you is enough for you to make a decision, I will still do that. Okay."

[16] Du Preez's response to those remarks is:

> "No, for as it enough Commissioner, (inaudible) testify."

[17] The applicant argues that the Commissioner should have done more than this. Du Preez is not legally trained. Therefore, says the applicant, the arbitrator should have taken a more active role and should pertinently have alerted Du Preez to the fact that he would have to call Deetlefs (or another SAB representative) in order to discharge the onus to show that the dismissal was fair.

[18] On the other hand, the employee's representative argues that Du Preez was fully aware of the significance of hearsay evidence and that the onus rested on the company; and that, in any event, he had the company's human resources manager sitting next to him at arbitration, who could have advised him of the consequences of the failure to call Deetlefs.

Legal principles

[19] As Wallis AJ[1] remarked in *Naraindath v CCMA*[2]*:*

> "It is obviously not possible to lay down specific guidelines for commissioners as to the manner in which they should conduct arbitrations. There may well be cases where the adoption of a traditional adversarial approach is justified, for example, because the true issue depends upon the resolution of a clear dispute of fact which can only be determined by listening to evidence and determining the credibility of the witnesses. In that case a conventional trial format with evidence and cross-examination may be the most expeditious way of resolving the dispute. Such cases should in my view, however, be relatively rare. In general a commissioner will start with the brief statements required by the rules setting out the stances of the respective parties. The task of commissioner may be eased by having available a record of what relevant witnesses said at a disciplinary enquiry. There may well be documents which are relevant and the consideration of which will dispose of peripheral matters. Ordinarily there will be no legal representation. In those circumstances it is wholly appropriate for the commissioner to conduct the proceedings in the same manner in which commissioners of the Small Claims Court have for many years conducted proceedings with conspicuous success. The proceedings before that tribunal are informal in nature and conducted in a manner determined by the commissioner subject to the overriding need to comply with the principles of natural justice (*Smit v Seleka en andere* 1989 (4) SA 157 (O) at 164D–G). As regards the success of following that approach in the Small Claims Court it is noteworthy that so far as I have been able to find there are only three reported cases since Small Claims Courts were established by the Small Claims Court Act 61 of 1984 where the decision of a commissioner has been successfully brought under review and only one of those arose from the manner in which the commissioner conducted the proceedings. I point out that the grounds of review established by section 46 of the Small Claims Court Act 61 of 1984 are very similar to those provided for by section 145 of the LRA."

[20] Should the commissioner in this case have adopted a more inquisitorial approach?

---

[1] As he then was – now JA.

[2] [2000] 6 BLLR 716 (LC) paras 20 – 35.

[21] In *Klaasen v CCMA*[3] this court expressed the following view:

"Commissioners acting under the auspices of the CCMA in terms of the LRA are expected to act inquisitorially or investigatively. Section 138(1) of the LRA provides that a commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities. This includes stepping momentarily and cautiously into the arena to direct the proceedings in the interests of justice. In *Consolidated Wire Industries (Pty) Ltd v CCMA & others* (1999) 20 *ILJ* 2602 (LC); [1999] 10 BLLR 1025 (LC) the Labour Court stated:

'The parties were laymen unrepresented by legal practitioners and without the benefit of pleadings to tie the parties to a version. When a version is changed or a new version is suddenly presented the arbitrator must take charge of proceedings. He cannot rely on the parties to realize what it expected of them unaided.'

By the same token, and perhaps even more so, one might expect the commissioner to take charge by instructing a party to put a version (of which he is aware) under oath or risk the consequence of an adverse inference or his acceptance of the uncontradicted testimony. The failure to give that warning, in the light of a commissioner's inquisitorial function and duties, in my assessment, constitutes a reviewable irregularity.

I find support for this proposition in the judgment of Gamble AJ in *Scholtz v Commissioner Maseko NO & others* (2000) 21 *ILJ* 1854 (LC); [2000] 9 BLLR 1111 (LC) at 1119-20 where in relation to similar but not identical facts he held:

'It seems to me more probable that the applicant did not give viva voce evidence before the first respondent because she did not comprehend that she was obliged to do so. Certainly, the first respondent took no steps to inform the applicant that the only way in which she could place her evidence before him was by giving viva voce evidence. Nor did the first respondent warn the applicant of the possible consequences of her failure to testify.

As pointed out above, the first respondent has in fact drawn an adverse inference from the applicant's failure to testify. In my opinion the applicant was prejudiced by the first respondent's failure to inform her of the rules of evidence and his intention to rely thereon, to the extent that she failed to present a proper case at the arbitration. The applicant has not had the benefit of the "fair play" approach in CCMA proceedings and the first respondent's admitted assessment of the evidence before him and his failure to properly advise the applicant constitutes a further irregularity in the proceedings.'

On a similar line of reasoning I am persuaded by Mr *Whyte*, who appeared on behalf of the applicant, that the commissioner misconducted himself by neglecting to inform the applicant that the only way in which he could place

[3] (2005) 26 *ILJ* 1447 (LC) paras 27 – 30.

evidence before him was by giving viva voce evidence under oath and by not warning him of the possible consequences of his failure to testify. The laissez faire approach adopted by the commissioner was inappropriate in the circumstances. He was under a duty to inform the applicant of the rules of evidence and his intention to rely upon them to accept an uncontradicted version or to draw an adverse inference."

[22] There are some indications in the transcript of the arbitration proceedings that Du Preez was more *au fait* with what was expected of him than the applicant now argues; and that the commissioner provided at least some guidance.

[23] Also, Mr *Pio,* who appeared for the employee at the arbitration and in these proceedings, alerted Du Preez to instances of hearsay evidence when cross-examining him.

[24] Nevertheless, in circumstances where the arbitration award stands or falls on the admission of hearsay evidence, I am persuaded that the commissioner did not pertinently alert the applicant (and specifically Du Preez) to the consequences of his failure to call Deetlefs (or another SAB representative).

[25] The CCMA Guidelines on Misconduct Arbitrations[4], albeit effective only from 1 January 2012, are also instructive insofar as it codifies existing case law.

[26] For example, Item 21 notes:

> "If it is evident ... that a party or its representative does not understand the nature of proceedings and that this is prejudicing the presentation of its case, the arbitrator should draw this to the attention of the party. Circumstances in which it may be appropriate for the arbitrator to do this include if a party -
>
> 21.1 fails to lead evidence of its version under oath or affirmation;
>
> 21.2 fails to cross-examine the witnesses of the other party or fails to put its version to those witnesses during cross-examination; and
>
> 21.3 changes its version of events or puts a new version during proceedings."

[27] It seems to me that, similarly, an arbitrator should alert an unrepresented party to the effect of his failure to call a witness to corroborate hearsay evidence. It would also be appropriate for an arbitrator in these

[4] Notice 602 0f 2011 (*Government Gazette* 34573).

circumstances to adopt a more inquisitorial approach, as envisaged by item 33 of the Guidelines:

> "An inquisitorial approach will often be appropriate if one or both parties is unrepresented, or where a representative is not experienced. Arbitrators adopting an inquisitorial approach must be careful to ensure that the parties are aware of, and have the opportunity to exercise, their rights under section 138(2). An arbitrator may conduct an arbitration in a form that combines these two approaches provided this is done in a manner that is fair to both parties."

And further in item 40:

> "The arbitrator may suggest that the parties lead evidence on a particular issue relevant to the dismissal in order to gain a full understanding of the issues in dispute or call a witness for this purpose."

[28] This was a case in point. The arbitrator should have made it clear to Du Preez that, should he not call Deetlefs, the evidence pertaining to the alleged complaints from SAB would be disregarded. In failing to do so, he committed a reviewable irregularity.

Remit or substitute?

[29] This is a matter where the very basis of the review is aimed at the process followed at arbitration. It must be remitted in order for a proper arbitration process to be followed.

[30] This process has had the unfortunate result that the employee has had to incur further legal costs. It was not brought about through his doing. He should not, in law or fairness, be held liable for the applicant's costs.

Ruling

[31] The arbitration award issued by the first respondent under case number WE 15023-08 on 4 July 2010 is reviewed and set aside.

[32] The dispute is remitted to the second respondent (the CCMA) for a fresh arbitration before another arbitrator.

[33] There is no order as to costs.

_____

A J Steenkamp

Judge

APPEARANCES

| | |
|---|---|
| APPLICANT: | S Snyman of Snyman attorneys. |
| THIRD RESPONDENT: | EH Pio of Solidarity. |