Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 351/2016

In the matter between:

SCEPTRE FISHING (PTY) LTD **Applicant**

and

ADAM KLAUS SWANEPOEL **First Respondent**

SOUTH AFRICAN PELAGIC FISHERMEN'S UNION (SAPFU) **Second Respondent**

CCMA **Third Respondent**

ANTHONY VERHOOG N.O. **Fourth Respondent**

Heard: 16 March 2017
Delivered: 30 May 2017
Summary: Review – unfair labour practice. Failure to pay bonus.
Crucial witness not called. Remitted for fresh arbitration.

JUDGMENT

STEENKAMP J

Introduction

[1] A fisherman's life is not an easy one, as the Afrikaans poet Uys Krige reminds us:

"Ken jy die see, Meneer, ken jy die see?

Hy lyk nou soos jou voorstoep blinkgeskuur
en kalm soos min dinge hier benee
maar hy's gevaarliker as vlam of vuur
Dan sê jy nog, Meneer, die vis is duur...

Wat van die storms wat nooit ophou raas?
Jy sit pal in jou kliphuis, klam en guur,
en hoor die wind al woester, wreder blaas
en daar's geen sprokkel hout meer vir jou vuur
Dan sê jy nog, Meneer, die vis is duur.

Was jy al van jou bootjie soos 'n veer gevee
deur 'n grys golf hoog soos 'n tronk se muur
Wat help dit om te spartel en te skree: "Nee! Nee"!
Sluk jy eers daardie waters sout en suur?
Dan sê jy nog, Meneer, die vis is duur...

Sien jy die krom ou vroutjie daar, Mevrou Mathee,
Wat telkens ver, ver oor die golwe tuur?
Sy dink dié briesie bring
haar seuns betyds terug vir tee.
Hul slaap al drie agter die kerkhofmuur.
Dan sê jy nog, Meneer, die vis is duur..."

[2] The applicant, Sceptre Fishing (Pty) Ltd, applies to have an arbitration award by the fourth respondent, Commissioner Anthony Verhoog, reviewed and set aside. He found that the applicant committed an unfair labour practice by refusing to pay the first respondent, Adam Swanepoel, a bonus in December 2015.

Background facts

[3] Mr Swanepoel is the first engineer on the company's fishing vessel, *Wafra*.

[4] The company implemented a remuneration policy on the *Wafra*. In terms of the policy, it would pay an annual bonus to all crew members provided they caught 95% of the fish landed of their allocation, subject to attendance, efficiency and good conduct. On 18 December 2015 it told Swanepoel that he did not qualify for a bonus. He referred an unfair labour practice dispute to the CCMA in terms of s 186(2)(b) of the LRA. Commissioner Verhoog found that the failure to pay a bonus was an unfair labour practice. He ordered the company to pay Swanepoel his bonus to the value of R 183 634, 00.

Review grounds

[5] The applicant submits that the arbitrator committed gross irregularities in the conduct of the arbitration proceedings and rendered an arbitration award that a reasonable arbitrator could not reach on all the material that was before him. More specifically, it argues that the arbitrator:

5.1 incorrectly concluded that the employee was not familiar with the company's policy document;

5.2 incorrectly recorded facts which, cumulatively, impacted on his ultimate decision whether the company had committed an unfair labour practice; and

5.3 found that the company had been inconsistent in circumstances where there was no basis for that finding.

[6] Mr *Cassells* also argued that the Commissioner committed a gross irregularity by failing to inform the employer of the consequences of failing to call a witness.

Evaluation / Analysis

[7] It is perhaps prudent to start with the last ground of review. If that is successful, the dispute would in any event have to be remitted and the other issues can be canvassed afresh.

[8] In his analysis of the evidence and arguments, the arbitrator found:

> "There was no evidence before me to show that the [employee] had been made aware of the criteria [to qualify for a bonus] or reasonably ought to be aware. This evidence is crucial because the [company's] contention was that it applied the criteria on giving bonus solely in terms of this policy."

[9] During the arbitration proceedings, the company tried to introduce the evidence of Hercules Roelofse by means of affidavit. It contends that the affidavit contained crucial information, as it recorded that Roelofse had spoken to the employee about his remuneration. This evidence was indeed crucial, as the Commissioner pointed out, as Roelofse had to explain the policy to crew members in his capacity as human resources representative. He stated in his affidavit:

> "Van my pligte behels om die dienskontrakte en die vergoedingskale met die bemannningslede te bespreek en te verduidelik en te sorg dat dit op datum is."

[10] When it was put to Swanepoel under cross examination that it was his responsiblity to familiarise himself with the policy, he replied:

> "Hercules Roelofse het vir my gesê ons kry … ek en hy kry R55 'n ton en dit is waar dit gebly het."

[11] When the company's representative tried to put to him that Roelofse had had more detailed discussions with him, the employee's representative objected. It is in those circumstances that Mr *Cassells* argued that the Commissioner should have made the employee and his representative – a trade union official – aware of the fact that they should call Roelofse to give direct evidence.

[12] The reason why the employee did not call Roelofse is that he (Roelofse) was required to be at the vessel at 13:00 on the day of the arbitration. Mr Stephen Knobel testified that, although a vessel going out to sea is

dependent on the weather, Roelofse could not be there as the "skipper het 'n tyd gegee vir eenuur vanmiddag moet hulle teenwoordig wees om see toe te gaan."

[13] The employer may well be criticised for not having made alternative arrangements in order for Roelofse to be in attendance. But its argument is that, given the Commissioner's view that his evidence was crucial, the Commissioner should have alerted the employer to this fact and, if necessary, stood the matter down in order for Roelofse to be called.

[14] The Labour Appeal Court had occasion to deal with a similar situation in *Matsekoleng v Shoprite Checkers (Pty) Ltd*.[1] In that case, the Commissioner refused to admit an affidavit which "went to the heart of the issue". The LAC held that the affidavit impacted on the substantive aspect of the employee's case and that the Commissioner should have admitted it and dealt with the weight to be attached to it. The court said:[2]

> "[41] Section 3(1)(c) of the [Law of Evidence Amendment Act 45 of 1988] confers a discretion on a court (or tribunal) in terms of admitting hearsay evidence if, in the opinion of the court (or tribunal), as the case may be, it is in the interests of justice to admit such hearsay evidence. The fact that the respondent's representative would not have been in a position to cross examine the author of, or deponent to, the affidavit if it was admitted, was not, in my opinion, a legally sound ground to have refused admission of the affidavit, in the light of section 3(1)(c). That aspect of the matter would only be relevant on the question of the evidential weight to be attached to the affidavit evidence concerned. As the matter stood, it did not appear that the commissioner properly applied his mind on this issue, if at all. In my view, the commissioner's failure in this regard constituted a serious misdirection and a gross irregularity, on the commissioner's part, in the conduct of the arbitration proceedings, which rendered the award reviewable and liable to be set aside.
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> [42] In any event, it seemed to me that, by applying thepre-1988 strict common law rule against hearsay evidence on the admission of the affidavit, as the commissioner apparently did, the commissioner did not

[1] [2013] 2 BLLR 130 (LAC).

[2] At paras 41-43.

thereby 'deal with the substantial merits of the dispute with the minimum of legal formalities' as required of him by section 138(1) of the LRA. In *Local Road Transportation Board and Another v Durban City Council* the Appellate Division (now the Supreme Court of Appeal) (Holmes JA) stated:

'A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.'

[43] In my view, therefore, the failure by the commissioner to apply his mind properly on the issue of admissibility of Mr Roberts' affidavit constituted a material error of law and a gross irregularity on the part of the commissioner which prejudiced the appellant in his right to a fair hearing."

[15] Much the same considerations apply in this case. The evidence in Roelofse's affidavit was crucial – the Commissioner says so. In those circumstances, I agree with Mr *Cassells* that the Commissioner should either have admitted the affidavit or stood the matter down in order for Roelofse to be called – more so where neither of the parties was legally represented.

[16] Following the precedent in *Matsekoleng*, the failure by the Commissioner to apply his mind properly to the issue of the admissibility of Roelofse's affidavit and his failure to inform the company of the consequences of failing to call Roelofse as a witness, is a reviewable irregularity.

Conclusion

[17] Given my view that this was a reviewable irregularity, I need not deal with the other grounds of review raised by Mr *Cassells*. But this court faces the same problem as the arbitrator did. The merits of the unfair Labour practice dispute cannot be properly adjudicated without the benefit of Roelofse's evidence. For that reason the dispute must, regrettably, be remitted to the CCMA.

[18] Even though the applicant was successful, this is not a case where costs should follow the result, given the requirement of fairness.[3] The dispute must be remitted. Another arbitrator may still come to the same conclusion.

Order

[19] I therefore make the following order:

19.1 The arbitration award by the fourth respondent, Commissioner Anthony Verhoog, under CCMA case reference number WECT 325-16 of 21 April 2016 is reviewed and set aside.

19.2 The unfair labour practice dispute referred by the first respondent, Adam Klaus Swanepoel, is remitted to the CCMA for a fresh arbitration before a different commissioner.

19.3 There is no order as to costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Glen Cassells of Maserumule Inc.
FIRST and SECOND RESPONDENTS:	Michael Garces Instructed by Ward, Ward & Pienaar.

[3] LRA s 162.