REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 165/15

In the matter between:

South African Breweries (Pty) Ltd	**Applicant**
and	
Heindrich HANSEN	**First Respondent**
CCMA	**Second Respondent**
Hilary Mofsowitz N.O.	**Third Respondent**

Heard: 18 November 2015
Delivered: 2 February 2016
Summary: Review – misconduct – allegation of racist language not proven – dismissal unfair. Application for review dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] This case deals with two elements of South African society that give rise to much conflict, namely race and beer.

[2] The driver of a beer truck subcontracted to the applicant company (SAB), Mr Clarence Booysen, alleged that a regional risk manager employed by SAB, Mr Heindrich Hansen, said to him: "Julle donnerse kaffers is ewe donners onnosel".[1]

[3] SAB dismissed Hansen for making a racially derogatory statement. He referred an unfair dismissal dispute to the CCMA. Conciliation failed. The arbitrator, Ms Hilary Mofsowitz (the third respondent) found that SAB had failed to discharge the onus to show that the dismissal was fair. She found on a balance of probabilities on the evidence before her that SAB could not show that Hansen had made the alleged statement. SAB seeks to have the award reviewed and set aside in terms of s 145 of the LRA.[2]

Background facts

[4] The unhappy events that gave rise to this dispute occurred at the Westerford premises of SAB of in Newlands, Cape Town, adjacent to the eponymous cricket and rugby grounds where much of its product is consumed annually. It happened on Youth Day, 16 June 2014.

[5] Booysen was driving a beer delivery truck for a subcontractor, D J Bosman Transport. He was leaving the premises to do deliveries. Hansen stopped the vehicle as the load was not properly secured. He refused to let Booysen leave without securing it. That much is common cause. There is a dispute whether Booysen as the driver was negligent in not securing the load or whether the security official on duty was responsible for checking and securing the load. What exactly happened after that, is mostly in dispute, as is the question whether there was a second driver on the vehicle who witnessed the incident.

[1] For the sake of this judgment it is unfortunately necessary to quote the alleged statement; and also to point out that, under the racist classifications of the apartheid regime, now removed from the statute books, Mr Booysen would have been classified as "black" and Mr Hansen as "white".

[2] Labour Relations Act 66 of 1995.

The evidence at arbitration

[6] Booysen chose to testify in Afrikaans. He testified that Hansen signalled to him to stop. Hansen came walking towards him and started shouting at him ("begin te skel"). According to Booysen, Hansen then said, "Julle kaffers is almal donnerse ewe onnosel" [*sic*].[3] Booysen then got out of the truck and said to Hansen, "Wie is jou kaffer?". Hansen did not answer. Booysen told him that he would take the matter further. Hansen then told Booysen that he would allege that Booysen said to him, "jou ma se poes".

[7] According to Booysen, he told Hansen that he had a second driver – Wendell Carolus – with him on the truck. Hansen told Booysen to leave the premises on foot. Booysen radioed the controller. The controller arrived and Hansen told the controller that Booysen had sworn at his mother. Booysen left the premises on foot.

[8] When questioning Booysen at the arbitration, Hansen referred Booysen to a statement that he had made to his attorneys dated 25 June 2014, nine days after the incident. In the statement Booysen recorded that he had asked Hansen, "who is your stupid blacks" [*sic*] (as opposed to his evidence at arbitration that he said, "wie is jou kaffer?"). When confronted with this discrepancy, he said that he had asked Hansen (in Afrikaans), "Wie is jou onnosele kaffers?"

[9] Hansen also questioned Booysen about the fact that he (Booysen) did not complain about the alleged use of racist language to the controller, Kurt Scullard. Booysen responded:

> "Ek het nie eens 'n kans gekry om te praat met hom nie, want Mnr Hansen het soos 'n besetene aangegaan en gesê niemand vloek my ma se goed nie, soos hy nou daarnatoe gaan en so aan…"

[10] Wendell Carolus testified that he was partnered on the vehicle with Booysen as a co-driver. He had driven the night shift and remained in the cab of the truck (in the sleeping area behind the seats) when Booysen left to do deliveries on 16 June. He was asleep but was woken up by the altercation. He overheard Hansen saying, "Maar julle kaffers is ewe

[3] Quoting verbatim from Booysen's testimony, although it doesn't make grammatical sense.

onnosel." Booysen got out and said, "Wie is jou kaffer?" Hansen then told a security official that Booysen had referred to his "MP".[4]

[11] Kurt Scullard, the controller, confirmed that Booysen had called him to the scene by radio. Hansen complained that Booysen had sworn at him and invoked his mother's genitalia. Booysen did not mention the use of racist language to Scullard.

[12] Lifikile Luke, Hansen's immediate supervisor and area risk manager, investigated the incident. He acted as initiator at the disciplinary hearing. He was not present when the altercation occurred.

[13] Hansen denied the allegation that he had used racist language. He stated at the outset that, as a regional risk manager for SAB for 14 years, it would have been irresponsible to utter any such words. He said that he is not a racist and that he is a patriot who does not tolerate racism in any form. He confirmed that he stopped the truck because it was not properly secured. He pointed that out to Booysen, who was still sitting in the driver's seat. Booysen swore at him "and used indecent and foul language towards the dignity of my deceased mother". Booysen jumped out of the cab. He was aggressive. Hansen did not see another driver. He asked a security guard to record the incident. He pointed out that there was no mention of him using racist language in the occurrence book. He also asked Scullard to report the incident to D J Bosman management. He volunteered to undergo a polygraph test. The test showed no deception.

[14] Hansen was cross-examined by Booysen's representative. He again denied using the racist words. He also referred to control sheets showing the movement of vehicles. That record showed that the vehicle entered and left the site the previous evening, whereas Carolus had testified that he had taken the vehicle off site and stayed overnight in Vredendal. Hansen argued that the versions were incompatible; that Carolus was not on the truck when the incident occurred; and that he had fabricated his testimony to corroborate that of Booysen.

[4] A reference to the vulgar insult, "jou ma se poes", or as Mr *Jorge* referred to it, the Cape vernacular insult.

The award

[15] The arbitrator referred to the argument by Booysen's representative that it was probable that Hansen had used the word "kaffers" because he thought that, because Booysen was black, he would not understand Afrikaans. She found it unpersuasive because "the word is known and understood by all people of South Africa irrespective of the language spoken." She also could not see why Hansen would have thought that Booysen was "an African person".

[16] She also found Booysen's version to be lacking in credibility "given that he failed to use the opportunity to inform his controller when he had the opportunity to do so, failed to inform his employer and informed the shop steward a few days later". And it appeared that Booysen only mentioned to the shop steward that he had been told to leave the site, as opposed to having been humiliated or sworn at.

[17] The arbitrator pointed out that SAB relied heavily on the evidence of Carolus; but the evidence did not support the version that Carolus was on the vehicle at the time. Carolus testified that he had worked night shift the previous night and remained on the vehicle; but the documentation recording vehicle movements did not support his version. Against that background, she found Hansen's evidence that Carolus was not on the vehicle at the time of the incident to be more credible.

[18] The arbitrator concluded on a balance of probabilities that SAB had not discharged the onus of proof to show that Hansen had uttered the racist comment. She reasoned:

> "While there is a likelihood that both versions are probable, [SAB] must convincingly prove that its version is the most probable version. [It] cannot discharge the onus where both versions are equally probable. Given that Booysen's version was not entirely credible, that the appeal officer was not convinced, that the security documentation does not support the version of Carolus, that Booysen did not raise the issue with the controller, that Booysen was known to be problematic, that the shop steward did not query the derogatory statement with [Hansen] and for all the other reasons

> mentioned above, [SAB] has not convincingly shown that [Hansen] was guilty of the allegation for which he was dismissed."

Review grounds

[19] Mr *Jorge* argued that the commissioner's decision was not one that a reasonable decision-maker could reach. He submitted that she took into account irrelevant evidence and ignored material evidence.

[20] Firstly, he points out that the arbitrator referred to the finding of the internal appeal chairperson that Booysen was violating sealing protocol; that he was therefore fearful of losing his job; and that he could have been motivated to fabricate his version.

[21] Secondly, the appeal chairperson disregarded Scullard's testimony, as he was not a witness to the incident and he was used as an interpreter in the disciplinary hearing.

[22] Thirdly, Mr *Jorge* takes issue with the arbitrator's findings on the security load registers. He argues that the registers are completed by the gate security and therefore could not impact on Carolus's credibility. The accuracy of the register, he argued, left much to be desired.

[23] Lastly, the argument was that the versions of Booysen and Carolus were more credible than that of Hansen; that Carolus was on the truck; and that Hansen should not have been allowed to read his statement into the record.

Evaluation / Analysis

[24] The test on review is by now all too well known:[5]

> "That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

[25] And in *Herholdt v Nedbank Ltd*[6] the SCA explained:

[5] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC) par [110].

> "A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable."

[26] Could the arbitrator have reached the conclusion that she did on the evidence before her? I think so. She considered the evidence and weighed up the probabilities. On review, as opposed to appeal, her conclusion was one that another arbitrator acting reasonably could also have reached.

[27] It is so that the arbitrator referred to the appeal chairperson's finding with regard to Booysen's credibility. But the award and the evidence at arbitration must be regarded holistically. She formed her own view of the probabilities on the evidence before her. And she also found Booysen not be a credible witness, but for reasons other than those mentioned by the appeal chairperson. That is not a finding that a court on review is likely to interfere with.

[28] As to Scullard's testimony, although the appeal chairperson disregarded it, the arbitrator did have regard to it in the arbitration, which is a hearing *de novo*. She considered Hansen's undisputed evidence that he had instructed Scullard to find an alternative driver to take the truck off the premises. It is common cause that Scullard was not a witnesss to the incident. And she pointed out that Scullard testified that Hansen complained that Booysen had sworn at him; yet Booysen made no mention of Hansen's alleged racist insult. The oblique reference to the appeal chairperson's findings does not make the result of the arbitration award unreasonable in the light of the evidence led at arbitration.

[29] Turning to the security registers, the arbitrator quite reasonably considered the discrepancies between the evidence of Carolus and the vehicle movements recorded on the register. Her conclusion in this regard may be

---

[6] [2013] 11 BLLR 1074 (SCA) para [25].

right or wrong; but it is not so unreasonable that no other arbitrator could have come to the same conclusion.

[30] Considering the question whether Hansen uttered the racist words, the arbitrator considered the credibility of the witnesses before her; the probabilities; and came to a conclusion on the balance of probabilities. She asked the right question and came to a reasonable conclusion. That conclusion is not open to review, as opposed to appeal. It is so that Carolus essentially corroborated Booysen; but the arbitrator clearly and reasonably explains why she preferred the evidence of Hansen. That is exactly what an arbitrator should do. The test is not whether this Court may have come to a different conclusion; it is whether the conclusion reached by this arbitrator is so unreasonable that no other arbitrator could have reached it. I think not.

[31] It does appear that Hansen started off his testimony by reading from his previous statement. That is generally not advisable. But it must be borne in mind that he was unrepresented and that SAB's representative did not object. That fact did not deprive the parties of a fair hearing and was not a reviewable irregularity in the conduct of the arbitration. In the case relied upon by Mr *Jorge*[7] the court also did not review the award on the ground that a witness was allowed to read a statement into the record.

Conclusion

[32] Viewed holistically against the evidence led at the arbitration, the award is not so unreasonable that no other arbitrator could have come to the same conclusion. There was no irregularity in the conduct of the proceedings either. It is not reviewable in my view.

Costs

[33] Hansen was represented by his trade union, Solidarity, in these proceedings. Although he has been successful, I take into account that there is an ongoing relationship between the trade union and the employer. I also take into account that there is an ongoing employment

[7] *Serenite Wellness Centre (Pty) Ltd v CCMA* (2003) 24 *ILJ* 236 (LC).

relationship between SAB and Hansen, as the effect of this judgment is that he is reinstated. If anything, the events leading up to this judgment have pointed out, once again, how important it is for everyone in our society, given our racially divided past and the unfeeling and unthinking utterances of some members of that society even today, to count their words and to work harder at forging relationships. For all these reasons, taking into account the element of fairness, I think that a costs order may have a chilling effect on those relationships. I do not consider a costs award to be appropriate.

Order

The application for review is dismissed.

_____

Steenkamp J

APPEARANCES

APPLICANT: José Jorge of Norton Rose Fulbright attorneys.

FIRST RESPONDENT: N Greeff of Solidarity (trade union).