Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 1706/13

In the matter between:

PAULINE MKHONZA	**First Applicant**
EDITH LEDWABA	**Second Applicant**

and

SCOTTISH CLOTHING COMPANY	**First Respondent**
ADV T T SERERO (*N.O.*)	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**Third Respondent**

Heard: 24 March 2016
Delivered: 05 April 2016

Summary: (Review – alleged bias – failure to consider material evidence – attaching undue weight to evidence – misconstruing evidence – contradictory findings)

JUDGMENT

LAGRANGE J

Introduction

[1] Ms P Mkhonza ('Mkhonza') and Ms E Ledwaba ('Ledwaba'), the first and second applicants in this matter, have applied to review and set aside the second respondent's award in which he found that their dismissals for misconduct were substantively fair. The arbitrator effectively found them guilty of both offences they had been charged with which arose out of an incident where two out of four shirts bought by a customer could not be scanned at the till when they were sold. The unscanned items were not recorded manually on a draft order pad as they should have been. The first charge against the applicants was that they had made an authorised use of company funds, which related to what they had allegedly did with the R 650 additional payment on the credit card of the customer, which was not recorded on the till slips because the two shirts had not been scanned. The second charge concerned their failure to follow the normal procedure of recording items which did not scan.

[2] During the course of the arbitration, some video footage was viewed which did not form part of the filed record in the review proceedings. The video footage covered the incident showing the sale of shirts to the customer at around 13h40 and also showed the applicants removing some money from the till during the cash up process, at the end of the day. Although the viewing of the video footage during the arbitration was somewhat chaotic at times, there is no real controversy about the footage of the sale transaction. The only material controversy relates to what the applicants were doing when they removed cash from the till during the cash in the process.

[3] In relation to the charge concerning the failure to follow the proper procedure for recording the two items which could not be scanned, the arbitrator concluded that it was in fact common cause that they should have been recorded on a draft order pad and the applicants were indeed aware of this procedure. Their real defence to this charge was that they simply failed to comply with the procedure not because they did not intend to, but that they did not get an opportunity to do so because they were

busy. The arbitrator found their explanation for failing to record the two items was incoherent and contradictory.

[4] He found that the failure to adhere to the procedure resulted in them being unable to account for the missing R 650 which lent credence to the respondent's case that they had effectively misappropriated that money. The applicants' own explanation was that, before cashing had started, Mkhonza had placed a R100 note at the edge of the counter where the money was normally placed when they cashed up. The placement of the hundred Rand on the counter was apparently not captured on the video footage viewed at the arbitration and the applicants contended that if all the video footage for the day had been available that would have been shown. She had done so because she had asked Ledwaba to give her change when they cashed up so she could repay her R55 that she owed her. They had deposited the additional R650.00 arising from the unscanned items not recorded on the till slip in the safe. They were going to inform the person who would have rectified the discrepancy the next day but they were too busy and for the same reason they failed to record the unscanned item on the draft order pad. In describing his own observation of the video footage during the cashing up process in dealing with the contention that the video footage reflected the R 100 change transaction, the arbitrator put it thus:

> "However, the applicant's conduct on the footage that was presented during the arbitration depicts the applicants' placing the money for the cash up on the counter. Thereafter, the second applicant, Ms Ledwaba hands some money to Ms Mkhonza who places same next to speed point machine. She later places the money in her purse whilst under the counter. The applicants' overall conduct in handling the money during the cash process does indeed raise some suspicions. Thus, the respondent's assertion that the video footage depicts the splitting of the missing R650 between the two applicants is more probable."

[5] The arbitrator further concluded that the trust relationship had been broken as there was an element of dishonesty involved in the applicants' conduct, and that their dismissals were justified.

The review

[6] In ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*** [1], the SCA clarified the test regarding procedural latent irregularity as a ground of review.

> "[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. 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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."[2]

[7] In ***Head of the Department of Education v Mofokeng and others*** [3] the LAC reinforced the approach to be adopted as follows:

> "[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. **Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision**

[1] (2013) 34 *ILJ* 2795 (SCA)

[2] At 2806

[3] [2015] 1 BLLR 50 (LAC)

which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry**. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result**. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. **If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone.** The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.[4]

(emphasis added)

[8] In relation to the question of bias on the part of an arbitrator, which would amount to reviewable misconduct in the performance of an arbitrator's duties in terms of section 145 (2) (a)(i) of the Labour Relations Act, 66 of 1995 ('the LRA'), the test for bias was most comprehensively formulated by the constitutional court in *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish*

[4] At 60-61.

Processing)[5]:

> "[14] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. [15] It is no doubt possible to compact the "double" aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. [16] The "double" unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law. [17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged."

[9] The applicants raised a number of grounds of review which are essentially threefold in nature. The first is that the Commissioner demonstrated his bias in the course of his interventions in the arbitration which were with a view to soliciting answers from the witnesses which were favourable to the employer. Secondly, the arbitrator allowed substantial video footage to be introduced in the arbitration without that video footage being entered into the record as evidence. Thirdly, the arbitrator reached a number of findings that were not warranted on the evidence before him.

[10] In their supplementary affidavit, the applicants complain about alleged bias on the part of the arbitrator. The essence of the complaint is that, in

[5] 2000 (3) SA 705 (CC); (2000) 21 ILJ 1583 (CC), at 714-5

the course of his interventions during the leading of evidence, the arbitrator was not even handed in his approach to the applicants and the employer in that:

10.1 he intervened in a manner that solicited responses from witnesses which were favourable to the employer's case;

10.2 whereas he asked questions of the employer's witness to elucidate the evidence, he challenged the evidence of the applicants, and

10.3 he readily embraced the company's case and made findings in the course of evidence being led which were favourable to the company.

[11] The specific points raised in relation to bias are dealt with below without repeating details of each complaint set out in the supplementary affidavit. Any other grounds raised only in argument for the first time do not need to be addressed[6]:

11.1 The applicants contend that the arbitrator in the course of the applicants' representative's opening address indicated that he was not prepared to accept that there was no complaint from a customer. I do not understand the arbitrator's reasoning to be conclusive in that regard. His remarks are equally compatible with someone who is trying to get to grips with the relevance of the existence of a complaint when there was also video footage of the entrance action in question.

11.2 In relation to the allegation that pages 30 and 42 of the transcript reveal that the arbitrator was attempting to get answers favourable to the employer, I am satisfied that the arbitrator's questions were quite legitimate ones made in an attempt to understand the evidence of the witness who was clearly speaking more quickly than the arbitrator could capture the evidence.

11.3 Similarly, complaint that the arbitrator was asking leading questions and taking over the employer's case on the basis of what is recorded on page 44 of the transcript is a distortion of the fact that the

[6] See ***Rustenburg Platinum Mines Ltd v CCMA & others*** **[2004] 1 BLLR 34 (LAC)** at 38, par [15].

arbitrator was simply trying to assimilate evidence that was already led by the witness and confirmed in his own mind.

11.4 At one point in the transcript when the video footage of the transaction was being viewed, and the applicant's representative was questioning the employer's witness about whether or not it revealed a conversation taking place with the customer during the transaction, the Commissioner's intervened and confirmed that in his understanding the respondent's case was that the correct recording of the transaction did not take place, irrespective of what might have been said to the customer. The applicants interpreted this to be a premature finding about the relevance of any conversation. However, there was no evidence tendered later to show that whatever discussion took place with the customer had any bearing on the merits of the case against the applicants. Moreover, I see nothing improper with an arbitrator trying to keep a case on track in order to avoid the pursuit of lines of enquiry that could have no material impact on the case.

11.5 The applicants further contend that the arbitrator ignored an admission made by the Beuys to the effect that if items which were been scanned had the same barcode it was not necessary to scan each individual one. The witness had answered that if that had been done, then the till slip would have reflected that. I fail to see how this amounted to some kind of admission that the arbitrator ought to have taken into account, or that his failure to do so somehow was fatal to the reasonableness of his award.

11.6 A supposedly unwarranted intervention by the arbitrator in clarifying evidence on page 58 of the transcript, does not justify an inference that he had overstepped his authority. Once again, his question flowed simply from the evidence already given by the witness which he was trying to understand.

11.7 When the applicants' representative asked for earlier video footage prior to the cashing up process in order to try and demonstrate that Mkhonza had placed R100 on the counter before the cashing took

place because she wanted Ledwaba to give her change and the employer's witness explained that he had only brought an extract of the video footage, the Commissioner asked if the applicants had raised this version of events in the original disciplinary enquiry. On the face of it, that question might have been understood to have been intended to favour the employer's case, but it is equally possible that it was asked simply because the request had just been made for footage which the employer could not necessarily have anticipated would be required if that aspect of the applicants' case had never been raised before the arbitration hearing. The applicants' representative did not object to the question at the time, which he ought to have done if he felt it was and unambiguous attempt to assist the respondent. On its own I am not satisfied that the question was enough to raise a reasonable perception that the arbitrator was biased.

11.8 The applicants also criticise one of the arbitrator's observations during the viewing of the video footage of the cashing up process where he comments that not only is money put aside on the counter but it appeared as if money was put inside one of the applicants' handbags. Mkhonza immediately comments that it was not money been placed in the back but forms. The arbitrator's observations took place in the course of everyone commenting on what they believe the video footage depicted. In the context of the charges against the applicants, it was not inappropriate of the arbitrator to record what he believed he saw. The fact that he did that made it possible for Mkhonza to respond directly to his perception. If this was the first time that such an observation had been made in the course of viewing the evidence it might have been construed as an attempt to unduly highlight evidence favourable to the respondent, but it is evident from the prior evidence given by the respondents' witness, Mr Beuys that he had already made an observation to this effect so it was not as if the arbitrator was raising this interpretation of the video footage as an original observation by himself.

11.9 Later, the end of Mkhonza's evidence in chief, the arbitrator points out more than once that a number of material issues raised by the witness had not been put to the respondents' witness. Clearly these comments invited the respondents' representative to tackle the witness on that discrepancy during cross-examination. However, it is also apparent from the record that the remarks were a reflection of the arbitrator's frustration with the applicants' representative not having put the issues to Mr Beuys under cross-examination. This is evident from later portions of the transcript where he explains that if the applicants' representative had not been a lawyer he would have explained the need to put the applicants' version to the respondents' witness but did not think it was necessary because he was a legal representative. Whether or not the respondents' representative proceeded to cross-examine the applicants on the failure to put certain aspects of their version to Beuys, the arbitrator would still have had faced the dilemma of considering how much weight could be given to their evidence in the light of those issues not being canvassed with him.

11.10 Lastly, the applicants' complain that the arbitrator improperly ruled that they should not be present when they gave evidence themselves. It seems the arbitrator was persuaded by the respondents' representative that they would be able to tailor their evidence to each other's if they were both present when they presented evidence. The arbitrator failed to appreciate that as co-accused they were entitled to hear all the evidence relating to the case including that of each other. This was certainly an irregularity in the conduct of the proceedings, which could have resulted in prejudicing their case, but the applicants did not advance any argument about how it had affected the outcome of their case or prevented them from presenting the evidence they did. There is nothing to suggest despite this irregular step by the arbitrator that he made adverse finding against them based on contradictions between them as opposed to simply the difficulties in their common version of events.

[12] Addressing the second ground of review it must be mentioned that the applicants were legally represented during the arbitration and that they had ample opportunity both to review and comment on the video footage. They raised no objection to the video footage as such, but only that they wanted additional footage relating to the change in transaction. In fact, during the course of the arbitration hearing they referred to the video footage and cross-examined witnesses on the basis of what it supposedly showed and did not show. In their argument at the close of the arbitration proceedings they relied on what they claimed was the unclear footage of the cashing up operation to advance their own case. If the applicants wished to object to the introduction of the video footage as such they ought to have done so at the arbitration and can hardly criticise the arbitrator on review for not having deliberated on the admission of the evidence at the time, when they never pertinently raised the issue before him at the appropriate time in the proceedings.

[13] The applicants' complaint that the arbitrator allegedly misconstrued evidence or failed to take account of it, contained a number of components which are discussed below:

13.1 The applicants contend that the arbitrator erred in accepting that there was a complaint lodged by the customer about the fact that the till slip he received only reflected the two shirts which were scanned. Whether or not a complaint was made the essential issue in the case concerned the fact that two shirts were not properly scanned or accounted for, which was common cause. Accordingly, it is irrelevant whether or not the respondent established that the customer had complained.

13.2 The applicants say that the arbitrator could not conclude that they had breached the employer's procedures when no evidence of those procedures was produced. The applicants in the course of the evidence agreed what they should have done in recording the unscanned items. The essence of their defence was not that they were ignorant of what they supposed to have done in recording the unscanned items, but that they did not have the time do so.

Consequently; the fact that no written procedures were produced in the arbitration was not of any consequence to the case, since the rule was effectively acknowledged by them anyway.

13.3 The applicants complained that the arbitrator unjustifiably held that the video footage did not support their version of the 'change' transaction during the cashing up process when in fact it did. If the applicants wished to rely on the evidence of the video footage they ought to have included it in the review record which they failed to do. Accordingly; they cannot rely on this ground.

13.4 They contest that there was no evidence to support a conclusion that R650 was missing nor that the R1050 which was in the employer's safe was not related to the unscanned items. In this regard, the evidence that the till records did not reflect the additional R650 received in respect of the other scanned items because the proper procedure for recording that amount on the draft order book was not really in dispute. In relation to the amount of R 1050.00, the arbitrator in fact made no finding in this regard, even if this amount related to the R 1450-00 overage in the till at the end of the following day, which the applicants claimed included the amount of R 650-00 they had placed back in the till.

[14] If one considers the arbitrator's reasoning, his doubts about the whereabouts of the R 650-00 stemmed largely from his dissatisfaction with the applicants' failure to properly record the unscanned items manual and their failure give a plausible explanation why they failed to rectify this by the time they were suspended by the mid-day the following day. This is not an implausible interpretation of the evidence before him even if it was not the only possible one. Another arbitrator might have placed more weight on other factors, but I cannot say that the outcome in this instance was not one that no reasonable arbitrator could have reached on the evidence before him.

[15] In so far as there might have been occasions in the proceedings when the arbitrator appeared to have been predisposed towards the employer, those instances are very limited and most of the examples raised by the

applicants do not indicate bias at all. The criticism of the applicants' failure to put certain aspects of their case to Beuys was not something that the arbitrator was not entitled to raise as a concern. In any event, without even considering those issues which were not put to Beuys, which incidentally did not appear to ultimately play a role in the arbitrator's reasoning, the arbitrator's findings were not insupportable on the remaining evidence. Similarly, such discrepancies which might have resulted from the applicants not testifying in each other's presence are not ones that appear to have had a material effect on the outcome and they identify no prejudice actually suffered by them in conducting their defence as a result.

[16] In conclusion, and bearing in mind the test enunciated in *Mofokeng's* case above, notwithstanding certain irregularities in the conduct of the proceedings, this is not a case where I believe the magnitude of those irregularities warrants setting aside the award in the sense that they were not so gross nor were they such that they deprived the applicants of a fair opportunity to present their case or that but for those irregularities the outcome would have been different because of any distorting impact they may have had on the outcome. Even on the applicants' own version, they had serious difficulties explaining their failure to follow the procedures which they knew they were supposed to follow, despite an adequate opportunity to do so. It was this which clearly informed the arbitrator's reasoning and that was not an unjustifiable inference to reach on the evidence properly before him.

Order

[17] The review application is dismissed.

[18] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	M Desai instructed by N Moodley
FIRST RESPONDENT:	W P Bekker instructed by Nothnagel Attorneys