IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

CASE NUMBER: P 98 / 04

In the matter between:

Lukhanji Municipality

Applicant

and

Nonxuba N.O **First Respondent**

South African Local Government Bargaining Council **Second Respondent**

SAMWU obo Seboni **Third Respondent**

JUDGMENT

CELE AJ

INTRODUCTION

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("The Act") to review and set aside an arbitration award dated 25 February 2004 issued by the first respondent, while he was acting under the auspices of the second respondent. The third respondent which is acting on behalf of its member Mr Seboni, in whose favour the award was issued opposed the application.

Background Facts

[2] Mr Seboni commenced employment with the applicant in 1994. He took a position of a Road Traffic Inspector, with the duties of a testing officer and therefore a qualified Inspector of drivers' and learners' licences. At the times relevant to this matter, he worked under the Chief Traffic Officer, Mr Edmund Vincent Winnaar and they were both based at the applicant's municipality in Queenstown, Eastern Cape. One Ms Yolanda Delport worked with them as a cashier and a clerk.

[3] The basic testing procedure for a driver's licence used by the applicant was that a candidate completed an application form, BL1, by supplying his or her personal particulars and handed the form to the clerk. The candidate had to pay an appropriate fee to book for a drivers test. A receipt would be issued by the cashier. At the bottom of the receipt a stamp would be affixed leaving imprinted information for candidates about the requirements for a drivers licence which he or she had to bring on the test date, which would

also be endorsed within an allotted space of the stamped information. The candidate would thus have been given a date and time on which the driving test would be conducted. On the scheduled date and time the candidate would arrive at the premises of the applicant. The testing officer had to collect the application form from the clerk and had to call out the name of the applicant. Testing of the candidate then began and had to include the actual driving of a motor vehicle of a class for which the licence ought to be issued. The testing officer had to endorse in the appropriate portion of the application form whether the candidate passed or failed and had to hand the application form to the candidate who passed. The candidate had to take the form and the test sheet to the cashier where a prescribed fee had to be paid and the process for the issue of a drivers licence began.

[4] On 16 April 2002, one Mr Mamei Sepete was scheduled to do a driver's licence test at 14H45 for a C1 class motor vehicle which was a code 10 truck. On his arrival at the test centre, Mr Sepete handed a letter addressed to Mr Seboni to Ms Delport. Soon thereafter Mr Seboni came to Ms Delport's office, took an application form for a driver's licence and called out the name of Mr Sepete. Both Mr Seboni and Mr Sepete left that section of the establishment and proceeded towards Mr Seboni's office. Sometime later Mr Sepete returned to Ms Delport with a test sheet and the driver's application form which had entries completed by Mr Seboni. One such entry was C1 which was understood to mean that Mr Sepete had undergone a motor vehicle test and had passed the test, whereafter a C1 motor vehicle driver's licence was to be issued to him. Ms Delport received R 100 = 00 from Mr Sepete for

the issue of a driver's licence to him. Ms Delport began to process the issue of a driver's licence but soon communicated to Mr Sepete that the computer she was using was giving her problems. Mr Sepete was made to wait for a while.

[5] While Mr Sepete was waiting at Ms Delport's room, he was approached by members of the South African Police Services (SAPS) holding ranks of inspectors. They were Mr Gregory Heath and Mr Mark Van Erden. Also in attendance was a Mr Judeel, a prosecutor in the subsequent disciplinary enquiry. Mr Sepete was taken to an adjacent room where he was interrogated. He informed the members of the SAPS that he had not undergone a driving test even when a drivers licence was about to be issued to him. Mr Seboni was brought to him and Mr Sepete identified him as the testing officer who had completed a portion of his driver's application form which Mr Sepete had finally handed to Ms Delport. Both Mr Sepete and Mr Seboni were then taken to the local police station where further interrogation of Mr Sepete took place. No driver's licence was finally issued to Mr Sepete pursuant to the activities of that day.

[6] The applicant subsequently charged Mr Seboni with the following acts of misconduct:

> "1.Providing false information on the test sheet of Mr Sepete on 16 April 2002;
>
> 2. Fraudulently authorising a driver's licence to Mr Sepete without the necessary tests being conducted;

3. Not following rules on 16 April 2002, allegedly tested Mr Sepete at times which were not according to his appointment time;

4. Not following rules on 16 April 2002 by providing incorrect information on the test sheets;

5. Issuing code C1 drivers licence while the registration number of the vehicle provided on the test is that of a light motor vehicle, code B." (sic)

[7] On 03 May 2002 the disciplinary proceedings commenced but were postponed at the instance of Mr Seboni to 10 May 2002. On 10 May 2002 Mr Mnyengeza who was the third respondent's official, representing Mr Seboni, made an unsuccessful objection to Mr Hoko, the applicant's councillor, for chairing the hearing and for Mr Judeel for being a prosecutor. Mr Judeel was seen as both the prosecutor and the complainant. The hearing proceeded and the applicant called six witnesses. Mr Mnyengeza cross-examined all six witnesses. However, when the case of Mr Seboni was to be opened, he was not called to testify. Mr Judeel addressed the hearing by asking that Mr Seboni be found guilty as charged while Mr Mnyengeza asked for his acquittal. Mr Seboni was found to have committed all five acts of misconduct with which he was charged.

[8] On 03 May 2002 the applicant dismissed Mr Seboni who then referred the dispute about an unfair dismissal to the second

respondent for conciliation. When the dispute could not be resolved, Mr Seboni referred it to arbitration, the hearing of which was presided by the first respondent, as the arbitrator. The first respondent found the evidence of Mr Seboni to have been substantively unfair whereafter he ordered the applicant to compensate and to re-instate Mr Seboni. That culminated in the applicant lodging the present application.

The arbitration hearing

[9] The transcript of the arbitration proceedings was of a very poor quality, necessitating a reconstruction of the record of such proceedings. The hand written notes of the first respondent were used in the reconstruction process and are on file. While the end product is of great help, it is always advisable that the second respondent should take measures to ensure that mechanical recordings are properly done. No doubt this step will obviate a delay in the proceedings while avoiding a dispute of facts. To the proceedings, I now return.

[10] Mr Judeel represented the applicant while Mr Mdunyana appeared for Mr Seboni. The case of the applicant was presented through its four witnesses, Mr Hoko, Mr Winnaar, Ms Delport and Mr Sepete. Before Mr Mdunyana could call Mr Seboni to testify, Mr Judeel raised an objection. He pointed out that Mr Seboni had decided not to testify at the disciplinary hearing and therefore was precluded from testifying at the arbitration hearing. Mr Mdunyana opposed the objection. The first respondent ruled in favour of Mr Seboni testifying, holding that arbitration proceedings were a *de novo*

hearing. Mr Seboni testified and thereafter called Mr Mnyengeza as his witness. The case of the applicant was to the following effect:

- There was nothing untowards in Mr Hoko chairing the disciplinary hearing. While he was a member of council, as a councillor there was no provision against him acting as a chairperson of that hearing. As a chairperson, he was impartial.

- Mr Judeel's appointment as a prosecutor for the hearing was also regular. He might as well have been the complainant. It was up to the applicant to call the witnesses it chose to. A ruling that Mr Judeel could act as a prosecutor did not deny Mr Seboni of an opportunity to cross-examine the complainant as there were witnesses for the applicant who could be cross-examined.

- Mr Seboni was given a chance to testify after the case of the applicant was closed and Mr Seboni had been granted an adjournment to go and prepare for the presentation of his case. When the hearing resumed, Mr Mnyengeza made an opening address, as a summary of Mr Seboni's case, Mr Mnyengeza queried an earlier ruling of the chairperson in which he refused to recuse himself and allowed Mr Judeel to act as a prosecutor, and Mr Mnyengeza decided that Mr Seboni would not testify. Mr Hoko did ask Mr Seboni,

at least twice, if he was sure of what he wanted to do and Mr Seboni, himself declined to testify.

- One Mr Zech Bester conducted an audit inspection at the test station of Mr Winnaar and an audit report in relation thereto was handed to Mr Winnaar. Mr Winnaar and his staff including Mr Seboni had an informal meeting in which the report was discussed. The first respondent ruled against the admission of the report, in the absence of its author.

- No traffic examiner may authorise the issuing of a driver's licence without administering a test for a potential driver.

- It was better for a learner driver to do the test for a driver's licence with a truck than with a motor vehicle.

- It is possible for a traffic official to make a mistake when writing particulars of the driver's licence application form but it could cause problems for the examiner because he had to confirm the particulars on the test sheet and from the learner's licence.

- There is no procedure for the subsequent correction of a mistake which was earlier made on the driver's application form by the examiner.

- Testing officers had to be on time and candidates had

to be tested on time, not five minutes later or earlier. Mr Winnaar had no knowledge of whether testing officers ever tested earlier or later than the scheduled time.

- There was no rule which stipulated that if a test sheet was completed wrongly, that constituted an offence. There was neither a rule which said that if an examiner tested the candidate before a scheduled time, it was an offence. There was however a recommendation in favour of timeous testing. The testing station had been threatened by the inspectors of the drivers' licences that the testing station would be closed if Mr Bester's recommendations were not followed. Mr Winnaar did not know the consequences attendant to the breach of any of the recommendations. Mr Seboni was aware of the recommendations since a copy thereof was made for each examiner while another copy was placed on the notice board.

- Mr Sepete went to a driving school in Cofimvaba where he was given a letter addressed to Mr Seboni. The description of Mr Seboni was given to him so that he could deliver the letter to him.

- Mr Sepete had been taught how to drive a motor vehicle. He expected that there would be a motor

vehicle available for him to be tested with once he was at the station. He thought that he would be tested with a code 10 motor vehicle as he had practiced with a vehicle of a similar class. He was able to drive a motor vehicle but he was worried about whether he would pass the driver's test. However, he never drove a truck at the driving school.

- On his arrival at the test station Mr Sepete did not see Mr Seboni but he met a lady who worked with him. He handed the letter which bore a stamp of the driving school, together with his personal particulars to the lady. He was under the impression that his personal particulars were part of the letter. It was the first time that he was to be tested for a driver's licence. The lady told him to wait and soon thereafter Mr Seboni came, took the driver's licence application form and called him from the cash hall area where he had met the lady.

- Mr Seboni completed the application form by making written entries therein in connection with a driver's licence, whereafter he handed the form to him. Mr Sepete took the form and went back to the cash hall with it. At that stage he had not been subjected to a driving test. The cashier asked him to pay R 100 = 00 for a driver's licence and took the form and his identity book. She then told him to wait because the computer was giving her problems.

- As he waited, 2 white males came in and called him to the side. They introduced themselves as the members of the SAPS. They asked if Mr Seboni had tested him while showing him that his driver's licence had been issued.

- Mr Sepete described the person who had assisted him in the filling of the driver's licence application form to the police. That person was fetched by the police and Mr Sepete identified him as the one who had assisted him in completing the form.
- The SAPS members were in the company of Mr Judeel. While the police did not threaten him, Mr Sepete was afraid and shocked to be confronted by them. He however knew then that the problem related to his driver's licence since he had not been tested for it.

- Mr Sepete did not tell the cashier not to issue the driver's licence because he had not been tested and at the time, he was holding all the documents.

- According to the test report, Mr Seboni started the yard test for Mr Sepete at 14H30 until 14H40.

- A motor vehicle query was initiated at Mr Winnaar's offices and a report was generated in respect of motor vehicle registration number BTS 582 EC. The

registration number in question was supplied by Mr Seboni as being one of a motor vehicle used to test drive Mr Sepete on 16 April 2002. The registration number was of a Toyota Corolla 1.6 GL which was a light passenger motor vehicle carrier, described as a sedan. It belonged to one Mr N M Dinga of Umtata. The said motor vehicle did not qualify as a C1 motor vehicle.

[11] That basically closed the case of the applicant. The testimony given by Mr Seboni and Mr Mnyengeza, in rebuttal, was to the effect that:

- There were objections at the disciplinary hearing to Mr Hoko being a presiding officer and from Mr Judeel from being both a complainant and a prosecutor but the two did not recuse themselves. Asking questions to a witness who was prosecuting was difficult.
- He was granted an opportunity to call witnesses and Mnyengeza was given a chance to cross-examine applicant's witnesses. It was Mr Mnyengeza who decided what questions to put and which ones he would not ask. Mr Mnyengeza was responsible for that version of the applicant which stood uncontested, during the disciplinary hearing.

- Mr Seboni did test Mr Sepete, when Mr Sepete denied being tested, he was lying. The reason for lying was that he was being coerced to lie.

- When it was time to test Mr Sepete, he called him in, he first tested him and then completed the test sheet. He had obtained the relevant documentation from the office of Ms Delport. He did not know what have become of the envelope which was given to Ms Delport by Mr Sepete. He called Mr Sepete because it was time to test him.

- According to the test sheet, he had started to test Mr Sepete at 14H50 - 15 seconds. Prior to the test, he did not know where Mr Sepete had been but he had not been to his (Mr Seboni's) office. The procedure known to him was that an examiner was to call the candidate when it was time for testing. Mr Sepete's test took 9 minutes.

- Mr Seboni was not part of staff that attended an informal meeting where Mr Bester's report was discussed. The meeting was attended by Mr Winnaar, Ms Delport and an Official from the Department of Transport. He was testing at the time of the meeting. The notice in relation to the report was put by Mr Winnaar on the notice board in the afternoon of 16 April 2002.

- A candidate who had booked for a code 10 licence could be tested for a code 8 licence.

[12] That closed the case of Mr Seboni. I will proceed to the arbitration award.

The arbitration award.

[13] The first respondent analysed the evidential material before him and made, *inter alia*, the following findings:

- The applicant followed a fair procedure in respect of the dismissal of Mr Seboni.

- The applicant had to prove that the dismissal was substantively fair.

- The applicant failed to prove that rules existed regarding the following counts of misconduct: count 3, 4 and 5. Mr Winnaar conceded that there were no rules governing these conducts, other than the recommendation that was made by Mr Bester regarding appointment times that should have been adhered to.

- In respect of counts 1 and 2 the applicant failed to prove the existence of the rule, however common law makes the counts of :-

    1. Fraudulently authorising a driver's licence to Mr Sepete without the necessary tests being conducted;

2. Providing false information on the test sheet of Mr Sepete on 16 April 2002,

   dismissal offences as they border on the employee and consequently render the employment relationship intolerable.

- The upshot of the case was whether Ms Seboni tested Mr Sepete for a driver's licence or not. The evidence of Ms Delport and Mr Winnaar did not assist the case of the applicant on the crucial aspect.

- On whether or not the test was conducted, the applicant led the single evidence of Mr Sepete who said that he was not tested by Mr Seboni.

- The single evidence should be relied upon where such is clear and satisfactory. Mr Sepete was untruthful and evasive when testifying on the aspect of a test. The inevitable conclusion was that Mr Sepete was unreliable as a witness and more over, as a single witness. Mr Sepete was not credible. His evidence was rejected.

- The evidence of Mr Seboni was also not impressive. However the onus rested on the applicant and not on Mr Seboni, to prove on a balance of probabilities that the dismissal was fair.

- The dismissal of Mr Seboni was substantively unfair.

[14] The first respondent proceeded to make an order which included the compensation of Mr Seboni and his re-instatement by the applicant.

Ground for review

[15] The applicant alleges that the first respondent committed a gross irregularity and issued an award which was neither justifiable nor rational.

Submissions by the parties

[16] Mr Hertle appeared for the applicant and Mr Nyangiwe appeared for the third respondent. The applicant submitted a number of circumstances in which it alleges that the first respondent committed a gross irregularity and also that he issued an award which was not justifiable or rational. Three of such circumstances are that:

i) the factual findings made by the first respondent did not correspond with evidence properly placed before him,

ii) the first applicant erred in finding that the applicant failed to discharge the onus to prove the fairness of the dismissal;

iii) the award was not justifiable in relation to the reasons given for it.

[17] The respondent submitted that the applicant failed to prove that Mr Seboni committed any fraud. He pointed out that the applicant had the onus of proving its case and the first respondent correctly decided that the applicant failed to discharge such onus.

Analysis

[18] Section 145 (1) and (2) (a) (ii) of the Act permits the reviewing of an arbitration award in circumstances where the commissioner has committed a gross irregularity.

[19] It is trite that it is not merely a high-handed arbitrary conduct which is described as a gross irregularity. Behaviour which is described as perfectly intentional and *bona fide*, though mistaken, may come under that description. The crucial question is whether it has prevented a fair trial of the issues. See **Goldfield Investment (Pty) Ltd and another v City Council of Johannesburg and another 1938 TPD at 560.**

[20] Among various decisions which Mr Nyangiwe has referred me to, is the case of, **Smith v Commissioner for Conciliation Mediation and Arbitration & Others (2004) 25 ILJ 1072 (LC).** In relation to a gross irregularity, Ntsebeza AJ had this to say in paragraphs 7 and 8:

> "[7] An arbitrator commits a gross irregularity if in *inter alia*; his/her conduct is such that an inference can be drawn therefrom that the aggrieved applicant did not get a proper

hearing. If for example a commissioner commits a very serious mistake in a manner that also reflects that he/she cannot be said to have applied his or her mind, his/her award is reviewable. See *County Fair Foods (Pty) Ltd CCMA (1999) 20 ILJ 2609 (LAC).)*

A commissioner, furthermore, exceeds his/her powers if he/she makes findings that are not justified by evidence. If that is such that it leads him/her to draw inappropriate inferences, it would render an award reviewable.

[8] However, a mistake, however gross, is not misconduct. It must be so gross or manifest that it could have been made without misconduct before a court could justify drawing an inference that an arbitrator misconducted himself or herself. (See *Hyperchemicals International (Pty) Ltd & another v Maybaker Agrichem (PTY) Ltd & another 1992 (1) 20 ILJ 412 (LC); [1999] 1 BLLR 92 (LC).*)"

[21] At the very outset, I find no fault on the findings reached by the first respondent on counts 3 to 5; save to say though that the evidence pertaining to these counts were relevant in determining counts 1 and 2.

[22] A consideration of the merits and demerits of the application before me inevitably entails the examination of those facts which were properly made available to the first respondent. The first respondent was presented with uncontested evidence of Mr Sepete that:

- On 16 April 2002 he first went to a driving school in

Cofimvaba where he was given a letter addressed to Mr Seboni. The envelope containing the letter had a stamp of the driving school.

- A description of Mr Seboni was given to him so that he could deliver the letter to Mr Seboni.
- He came to the test centre where Mr Seboni worked, without a truck which he would be tested on.
- He handed the letter to a lady who worked at the test centre together with his personal particulars.
- Soon thereafter Mr Seboni came and took him away from the cash hall.

- He was soon confronted by the police.

[23] The first respondent did not evaluate this evidential material at all. In that respect, he failed to apply his mind to the evidential material which, by the nature of his duty, he was called upon to consider. Had he applied his mind to this evidence, he would probably have found that the presentation of a letter from a driving school, was highly suggestive of the absence at the test centre, of a driving school instructor with a truck, to present Mr Sepete for the driving test.

[24] The interrogation of Mr Sepete by the members of the SAPS is also not without significance. It provided an opportunity for the identification of the truck with which Mr Sepete allegedly tested. Mr Seboni was similarly confronted by the police. Yet the evidence

about the *in loco* identification of the truck used for the test is conspicuous in its absence. The only reasonable inference to draw from this fact is that there was never such a truck at the test station which Mr Sepete was tested on. Again, the first respondent failed to apply his mind to this evidence and to draw the necessary inference from it.

[25] The alleged mistake committed by Mr Seboni in writing an incorrect registration number of a vehicle used to test Mr Sepete, is of a curious nature. According to his evidence the test began in the yard. That is where the truck would be parked. All he had to do was to copy the registration number of the vehicle used from the vehicle itself, as and when it was in front of him. The first respondent decided not to evaluate this evidential material when he was enjoined with a duty to do so. Again he failed to apply his mind to such evidential material as was properly available to him.

[26] The decision of this court in **Moodley v Illovo Gladhouse & others (2004) 2 BLLR 150 (LC),** which Mr Nyangiwe also made reference to is apposite in demonstrating the errors of the first respondent. In relation to that case, Ntsebeza AJ observed in paragraph 21 thus:

> " …. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies (See R v Dhlumayo 1948 (2) SA 677 (A))."

[27] The commissioner in the **Moodley case** assessed the credibility of the witnesses and thereafter determined the probative value of the evidence. In *casu*, the first respondent assessed credibility only when he was faced with the two irreconcilable versions of whether Mr Sepete did or did not do the driver's test. The decision in **Stellenbosch Farmers' Winery Group Ltd and another v Martell ET CIE and others 2003 (1) SA 11 (SCA)** provides an informative guide in resolving factual disputes of this nature. Nienaber JA said in paragraph 5:

> "…. To come to a conclusion on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to

> experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail."

[28] While a commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, and that he or she must deal with the substantial merits of the dispute with the minimum of legal formalities, (Sec 138), the technique in solving disputes is equally applicable to him or her.

[29] The recordal of the proceedings supports the finding of the first respondent that Mr Sepete and Mr Seboni were not satisfactory witness. In my view however, the first respondent erred in not taking the investigative task further by determining the total probabilities of the facts which he was dealing with. There exists a great likelihood that, had he done so, he would have found that there is a preponderance of probabilities in support of the evidence

of Sepete, the short comings in his testimony notwithstanding.

[30] In my view, the errors committed by the first respondent are so manifest that they could not have been made without misconduct. In respect of counts 1 and 2, the first respondent denied the parties a fair trial of the issues and thus committed a gross irregularity.

[31] Counts 1 and 2 are by their very nature, when put together, a serious transgression which no doubt adversely tampers with the employer – employee relationship. It diminishes the trust which an employer would be entitled to bestow on an employee in the execution of a public duty. The transgression compromises the integrity of the examination process for driver's licences.

[32] Accordingly, the following order will issue;

1. The award of the first respondent in case number S/LUK/7/2003, dated 5 January 2004 is reviewed and set aside.

2. The award of the first respondent as aforesaid, should have been that Mr Seboni was not unfairly dismissed by the applicant.

3. Mr Seboni is not entitled to any relief in this matter.

4. No costs order is made.

CELE AJ

ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 14 February 2006

Date of Judgment: 25 August 2006

Appearances

For the Applicant : Advocate B Harte

Instructed by : Bowes McDougall

For the Respondent: Advocates': X Nyangiwe and C Cossle

Instructed by : Maqina Zani & Associates