IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO:C77/2008

DATE:11 MARCH 2009

Not Reportable

In the matter between:

COCA-COLA CANNERS OF SOUTHERN AFRICA (PTY) LIMITED — Applicant

and

L ABRAHAMS — 1ST Respondent

COMMISSIONER FOR CONCILIATION MEDIATION AND ARBITRATION — 2ND Respondent

VUYISA MAZWI N.O — 3RD Respondent

JUDGMENT

CELE, J:

The application before me is one brought in terms of Section 145 of the Labour Relations Act, 66 of 1995, hereafter referred to as the Act. It is intended thereby to review and set aside an arbitration award dated 7 January 2007 issued by the third respondent as a Commissioner of the second respondent. The award was issued in

favour of the first respondent, Mr Abrahams, who opposed the review application.

Mr Abrahams was in the employ of the applicant as a forklift driver for about fifteen years. Relations between him and his wife took a turn for the worse. His wife, Mrs Maria Abrahams, then took an electric power drill from the house which had been brought by Mr Abrahams and submitted it to Coca-Cola, that is to the applicant in these proceedings. She reported to the applicant that it had been brought to her house, or to their common house, by her husband. On receiving the report the applicant charged Mr Abrahams with a misconduct charge described as unauthorised possession of company property, the electric power drill was the subject matter.

He was found to have committed the act of misconduct with which he was charged and he was dismissed. Needless to say he was aggrieved by this. It happened at a time when he had moved out of the common household because him and his wife had become estranged. He then referred this dismissal dispute for conciliation and arbitration. Commissioner Suzanne Harvey of the second respondent found in an arbitration award dated 10 February 2006 that the applicant had failed to prove that the drill belonged to it, and she ordered the applicant to reinstate Mr Abrahams. The applicant was aggrieved by the finding and the order and it then applied for the review of the proceedings.

After the papers had been prepared both parties agreed that the arbitration award was to be reviewed and set aside. The settlement agreement which they then agreed to in that regard was made an order of Court and the matter was remitted to the second respondent for an arbitration hearing before another Commissioner. The settlement agreement had then been made an order of Court on 20 March 2007.

The matter then came before the third respondent as appointed Commissioner to arbitrate it. He found the dismissal to have been unfair and he ordered the applicant to reinstate Mr Abrahams with retrospective effect. The applicant has now initiated the present proceedings.

The grounds for review

In summary the applicant says that the third respondent issued an award that was unreasonable, if I use today's review test, unreasonable in that no reasonable decision maker could have reached it, and that the third respondent committed a gross irregularity, that he exceeded his powers. These were elaborated in the founding affidavit.

The following are brief substantiation of the review grounds.

- The third respondent rejected the evidence of Mrs Abrahams primarily on the basis that she had gone through an acrimonious divorce from Abrahams, the third respondent held

that Mrs Abrahams had handed the drill in to the applicant as an act of vengeance against her husband. The third respondent appeared to have rejected Mrs Abrahams' evidence in total on this basis.

- In rejecting Mrs Abrahams evidence the third respondent further relied on a completely irrelevant consideration namely that Mrs Abrahams had an alternative option of dropping off the drill at the place of residence of Mr Abrahams' mother, because she knew where that place was. This finding has no bearing whatsoever on the question of whether the drill belonged to the applicant. Given Mrs Abrahams' version it made eminent sense for her to have returned the drill to the rightful owner, as opposed to Mr Abrahams' mother.
- The third respondent in addition apparently found that Mrs Abrahams was involved in some form of romantic relationship with Mr Steyn. This conclusion bears no relation to the evidence before the third respondent, and borders on bizarre.
- The third respondent made the equally baseless finding that it was Steyn who in fact stole the power drill from the applicant around the same time as his timesheet fraud against the applicant. This was 1997 to 1998, at least six years prior to allegedly stealing the drill, or selling the drill to Mr Abrahams. The submission is as I have indicated the award is unreasonable, that the unreasonable reasoning of the third respondent in relation to the drill belonging to the applicant – the applicant says it would have been immediately apparent to

Mrs Abrahams upon a momentary inspection of the drill that it was the property of the applicant, since the drill to this date retains certain identifying marks such as a red number 10. This *inter alia* seriously called into question the third respondent's finding that there is no evidence to suggest that Mr Abrahams would have been aware that the drill belonged to the applicant, and finally the third respondent's acceptance of Abrahams evidence over that of the applicant's witnesses in itself constituted an irregularity given that Mr Abrahams evidence was replete with inconsistencies and contradictions.

- Mr Abrahams' evidence was inherently unreliable and ought to have been rejected out of hand, by impermissibly rejecting the evidence of the applicant's witnesses the third respondent failed to apply his mind to the material issues in dispute and prevented a fair trial of the issues.

In terms of Rule 7(A)(8) of the Rule for the proper conduct of these proceedings the applicant did amplify the review grounds and it pointed out the problems with the status of the record.

The arbitration award

I then looked very briefly at this award which has been assailed upon.

This is how the Commissioner dealt with it, I deal in brief with a number of chief findings that he made. He says the respondent is

enjoined to prove that the dismissal of the applicant was fair on a balance of probabilities in terms of Section 192(2) of the Act. He says that the applicant had no qualms accepting that the drill submitted as an exhibit at the arbitration was probably his. He however contended that he did not know that the drill belonged to the respondent. The two official questions emanating from this contention are whether the drill belonged to the respondent and whether the applicant knew that it belonged to the respondent.

The Commissioner then analysed the evidential material that unfolded before him and made various findings in relation thereto in terms of which version to accept and he preferred the version presented to him by Mr Abrahams as opposed to the version of Mr Steyn, Mrs Abrahams and Miss Hopley. He concluded that the applicant had failed to prove the infraction complained of and then ordered reinstatement.

He said the following towards the concluding remarks;

> "In my view the evidence of the respondent's witnesses was flawed. Not that the applicant's evidence was immune from flaws either. The applicant had occasions of contradicting himself as well. For instance, he testified at the last arbitration that they were friends with Steyn yet at the previous arbitration he did not say so. The applicant also talked about

being in possession of R70-00 for the first time at the last arbitration. In the previous arbitration he only talked about R50-00.

However, even though the applicant's version has these and other inconsistencies and contradictions, the bottom line is that the respondent's version suffers from the similar defect. To the extent that the respondent is the onus bearing party (sec 192 (2) of the LRA), the respondent must still fail on that basis.

In the event the onus has not been discharged and the dismissal was substantively unfair. The applicant wants reinstatement. At one point the respondent contended that the applicant's position was no longer available due to restructuring. In fact Donald said that the respondent was "currently looking at restructuring" which means that the process has not been completed. Moreover, there is no evidence to suggest that if the applicant was reinstated it was not possible to consult on possible alternatives that could save him from dismissal. For instance the applicant may consider working on another position, a demoted position, short time, or any other viable alternative. I must further point out though that even the reasoning that the applicant was not wanted back due to restructuring was also contradicted by the respondent's other witness, Hopley."

He then ordered the applicant to reinstate Mr Abrahams with

retrospective effect.

The most important findings though that the Commissioner made are those that deal with how he viewed the performance of the witnesses before him. He discredited Mr Steyn and explained why. It's common cause that Mr Steyn after he had left the employment of the applicant came back, posed and pretended to be another employee, used the clock card of another employee and committed fraud to the applicant. He admitted so during the arbitration hearing, and he did say that because he had been injured on duty he felt that he had not been properly treated and felt that he had to, he had an axe to grind in fact with the applicant.

At that time he was about – I think he left the company in the year 2002, but I think the fraud was committed either in 2002 or in 2003, but that appears to have been the time more or less when this power drill disappeared only to find its way to Mr Abrahams in about 2004.

The Commissioner dealt with the evidence of Mrs Abrahams as to when the drill was brought into the house, she said that it was brought in in 1994, and he made a finding that that evidence was inconsistent and compared that with her evidence in the previous arbitration hearing, where she had said that it had been brought in, in 2004.

I am more than willing to find that in fact she made a slip of tongue, to say that it was in 1994 that the drill was brought in. Because clearly so we have Mr Abrahams evidence as well here, it is not as if he's totally denying anything about the drill, he has the evidence that it did come to his possession in about the same period of time.

The main issue however relates to whether or not the applicant has succeeded in producing evidence of a strong enough nature to suggest that the tool in question belonged to it. Even at the beginning of the hearing of this matter I pointed out that this was in my view the main consideration and I asked Mr Lesley to address me on it. On numerous occasions he used testimony of Mr Abrahams to try and indicate that the tool in question belonged to Coca Cola, or the applicant. In my view the onus rested on the applicant to show that the tool in question was its property, secondly that its possession by Abrahams in the circumstances was unlawful. Once that is achieved then and only would Mr Abrahams bear the onus, which should have shifted, to show that he had a lawful possession. It would be unfair to begin by placing the onus on Mr Abrahams and look at his version. It must be remembered that there is significance in placing the onus where it belongs, because if it has not been discharged it will be inappropriate to visit the other party's version and to criticise it, except to the extent that it tends to support the party that bears the onus.

Ms Hopley's evidence suggests that the tool in question apparently

belongs to the applicant, but she was not conclusive in her evidence, she did not sound very much convinced. She says she assumes or she presumes in the light of the pointers, in the light of the description given to it by Mrs Abrahams.

One can understand her position because firstly she was a Human Resources Manager, I do not think that she was dealing with the tools, she is not the right person who should have been brought to testify on whether or not that tool belonged to the applicant. There is a factory that uses tools, there would be people in charge of that place, none of them were called to come in and identify the tool, which was very easy to do.

The second problem relates to the recording. It's common cause that in 1995 there was a change that the applicant used in the recording of his equipment, there was a record, register, that was portable, they changed to an electronic system. It would appear that there was a serious problem during that change because from 1996 onwards the records of the applicant about the tool in question are silent. This is where there is a big problem about this case, this is where both Commissioners who had the opportunity to look at the evidence tendered by the applicant commented on, they both in my view very correctly found that this was material evidence, it was critical and that it fell short of producing proof to indicate that the tool that was found was a tool belonging to the applicant, it was a tool that the applicant wanted to retain as its

own property, and therefore that its possession by Mr Abrahams under the circumstances was unlawful. This is where the case of the applicant falls flat.

We are talking of a period from 1996 to a period 2005, it's a sizeable period and the alleged unlawful possession happened here, that is why, as Ms Golden has referred me, the first commissioner looked at it and said but anything could have happened to this tool, it could have been written off. Here one is investigating objectively on what probably may have been the position, it may have been written off for instance as the first commissioner had suggested. I see that the second commissioner tended to follow suit. He tended to adopt the reasoning of the first commissioner. I am aware that Ms Golden avers that the two Commissioners could never arrive at a similar conclusion for no apparent reason. Obviously the second commissioner had the benefit of having looked at the other's award, that's why he also talks about the first award in his arbitration award.

In my view there is indeed a lack of evidence that goes towards proving on a balance of probabilities that the tool found was a tool of the applicant. It can therefore not be reasonably concluded that the possession by Mr Abrahams in the circumstances was unlawful or unauthorised. In my view it becomes unnecessary to go and look at how Mr Abrahams performed as a witness, I just can say it in passing that I have suspicions that Mr Abrahams also may have

told lies, but what is the relevance of that. For so long as the onus is not discharged by the applicant the matter should have stopped there. To try and shift the onus and go and look at evidence by Mr Abrahams and supplement what was supposed to be produced by the applicant was neither here nor there. I am mindful of the fact that the Commissioner here commented, very briefly on why he rejected the evidence of the applicant and why he accepted the evidence of Mr Abrahams. It will be noted in my judgment that I have referred to the criticisms that he levelled against the evidence of Mr Abrahams, but notwithstanding that he still sustained it. In terms of where the onus lay I agree with him. In terms of giving brief reasons and as he is bound to do so in terms of Section 138 of the Act I find that he said as much as was necessary in the circumstances.

Accordingly in my view the arbitration award issued by the third respondent in these proceedings cannot be faulted. It cannot be said that the decision reached by the third respondent is one that a reasonable decision maker could not have reached in the circumstances. I do not agree with the applicant that the third respondent committed any gross irregularity in the circumstances, I do not agree with the applicant that the third respondent failed to apply his mind appropriately to the issues, on the contrary in fact he grappled with the issues. One may not like the outcome thereof, but that is not the test for a review.

I as a judge may not like some of the things he said but that has nothing to do with the review test. In the circumstances the APPLICATION SHOULD FAIL AND THE AWARD STANDS. In terms of the costs I am of the view that the costs should follow the results. Accordingly the APPLICATION IS DISMISSED WITH COSTS.

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CELE, J

Date of Editing:30 March 2009

Appearances:

For the Applicant: Adv G Leslie instructed by Cliffe Dekker Hofmeyer

For the Respondent: Adv T Golden instructed by Delport Ward & Pienaar