IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NUMBER: JR327/07

In the matter between:

BARLOWORLD COACHWORKS WYNBERG	**APPLICANT**
And	
THE MOTOR INDUSTRIES BARGAINING COUNCIL	**FIRST RESPONDENT**
SUSAN R HARRIS N.O	**SECOND RESPONDENT**
NUMSA OBO SAMUEL BOESMAN	**THIRD RESPONDENT**

JUDGMENT

AC BASSON, J

[1] This is an application to review and set aside the decision of the Second Respondent (hereinafter referred to as “the Arbitrator”)

acting under the auspices of the First Respondent. The Arbitrator held that the dismissal was substantively unfair and ordered the reinstatement of Mr. Zitha (the Third Respondent – hereinafter referred to as "Zitha"). In addition to the reinstatement order, the Applicant was ordered to pay Zitha the sum of R 21 900.00 representing an equivalent of six months' remuneration.

[2] The Applicant is Barloworld Motor trading as Barloworld Coachworks Wynberg. The Third Respondent is the National Union of Metalworkers of South Africa acting on behalf of Zitha. Zitha was employed as a wash bay attendant as from 11 May 1988. Zitha was dismissed from the employ of the Applicant on account of gross misconduct after having been charged and found guilty of misappropriation of company property which allegedly took place on 21 December 2005.

Application for Condonation

[3] There is an application for condonation for the failure to serve the review application on the Third Respondent's Trade Union timeously. The attorney for the Applicant deposed to an affidavit setting out in detail the circumstances surrounding service of the application. The application for condonation is not opposed. I have

considered the application for condonation in light of the length of the delay; the explanation for the delay; the prospects of success; and any prejudice the Third Respondent is likely to suffer. I am satisfied that a proper case has been made out for condonation.

[4] It was briefly the Applicant's case that Zitha was dismissed after an incident during which he had tried to bribe another employee with the name of Mr. Govender (hereinafter referred as "Govender") from disclosing that he (hereinafter referred to as "Zitha") had poured clear coat from one container into another. At the disciplinary hearing evidence was led by a certain Mr. Soares (who was the initiator and the investigator) that Govender had approached him on 20 December 2005 and enquired as to what he should do if he caught anyone stealing. Soares explained to Govender that he (Govender) needed to give a full account of what he had seen. Later that day Govender approached Soares and explained to him that earlier on that morning when he arrived at his work bay, he saw Zitha in the primer bay area pouring clear coat into another container. When Govender enquired from Zitha what he was doing he was offered R 20.00 to "keep quiet". Govender also informed Soares that he had observed Zitha doing the same the previous day and that he had also asked him what was in the containers. Zitha was in the wash bay and had a container with

him. Zitha then replied “nothing”. Govender testified that he later checked the container and found that there was clear coat in it. Soares asked Govender to depose to an affidavit. Govender later went to the police station and deposed to an affidavit.

[5] Soares also testified that on the evening of 20 December 2005 the spray painter had collected a new can of clear coat from the stores. The following morning when he came to pick it up he noticed that it was empty notwithstanding the fact that he had only use a small coat the previous evening.

[6] Zitha denied that he had removed any clear coat or that he had tried to bribe Govender. He could, however, not give an acceptable reason as to why Govender would falsely implicate him.

[7] On behalf of Zitha it was argued that the Arbitrator had correctly considered and applied the relevant legal and fairness principles with the result that the conclusion reached was reasonable. In the alternative, it was argued that even if it is proven that an offence was committed, dismissal was not appropriate in the present case as the trust relationship was intact; there was no serious loss, damage or injury caused to the business of the employer, this was

a first offence; and light of the length of service of the employee and the age of the employee.

Review

[8] The review test has been laid down by the Constitutional Court as follows:

> **"***[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. 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."* (*Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) ad paragraph [110].)

[9] The Constitutional Court in *Sidumo* also gave the following guidelines to Commissioners when they are tasked with assessing whether or not misconduct was committed:

> *"[59] The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair. In terms of s 138 of the LRA, a commissioner should do so fairly and quickly. First, he or she has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based. This involves an enquiry into whether there was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes a determination on the issue of misconduct. This determination and the assessment of fairness, which will be discussed later, is not limited to what occurred at the internal disciplinary enquiry.*
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> *[61]…….. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organization Convention on Termination of Employment 158 of 1982 (ILO convention) requires the same."*

[10] A commissioner must thus be convinced on the evidence that the alleged misconduct did in fact take place and that it was of a sufficiently serious nature to justify dismissal.

The Award

[11] The Arbitrator gave a lengthy award in which she summarized the evidence of the various witnesses. It is clear from the record that the Arbitrator was confronted with two mutually destructive versions namely that of Govender and that of Zitha. She concluded that the other two witnesses, Soares and Schulz, only gave evidence on peripheral matters. She concluded that the Applicant had failed to prove on a balance of probabilities that Zitha was guilty of the transgression that he was charged with. It appears from the award that the Arbitrator was of the view (and that she therefore evaluated the evidence against this proposition) that because Govender was a single witness his evidence had to be approached with caution. For his proposition the Arbitrator relied on the following extract in Hoffman and Zeffertt *The South African Law of* Evidence 3rd edition at 452:

> *"…. When there are more than one witness in a case but only one who testifies on the point in issue while the*

evidence of the others relates to peripheral matter that has no bearing on the credibility of the crucial witness…, that former witness has to be treated as a single witness has to be approached with caution and that his value as a witness … must be weighed against factors which militate against his credibility…"

The Arbitrator then proceeded to evaluate Govender's evidence. The Arbitrator identified the following difficulties with Govender's evidence:

(i) Firstly, the Arbitrator was of the view that there was a possibility that Govender could have had a grudge against Zitha. This grudge arose from an incident which had taken place some 7 years ago. The Arbitrator, however, came to this conclusion despite the fact that Govender had stated that he bore no grudge against Zitha. The Arbitrator, however, came to the conclusion that, because Govender did not state in his evidence that "*their relationship was good*", and the fact that Scholz saw Govender and Sitha talk after the disciplinary hearing, does not mean that their relationship was good. The Arbitrator concluded: *"In my opinion, Mr Govender could have been motivated to*

fabricate a story. It was common cause that Mr. Zitha still owed him money." I am in agreement with Mr. Hutchinson that this conclusion amounts to pure speculation and that it was not reasonable to have come to a conclusion that Govender "*fabricated a story*". This conclusion does beg the question why Govender would have wished to implicate the Respondent after so many years? It certainly would not have assisted Govender to recouver his monies if Zitha lost his job? If Govender had wanted to recouver his money he could have instituted legal action against Zitha or could have approached their employer to assist him. The Commissioner also does not give any reason why she is of the view that Govender would have lied about his relationship with Zitha.

(ii) The Arbitrator further found that even if it was to be accepted that Govender did not bear a grudge against Zitha over such a long period of time, it was inexplicable that Govender did not try to apprehend Zitha. She also drew a negative inference from the fact that Govender did not try to call management or another employee for assistance. She further drew a negative inference from the fact that Govender made no attempt to obtain physical evidence of the container. The Arbitrator was also not impressed with

Govender's claim that he spoke to other employees because he had feared for his safety. The fact that Govender had waited 3 hours before he reported the incident was also found to be suspect in light of the seriousness of the offence. It is clear from this evaluation of the facts that the Arbitrator was critical of the fact that Govender did not report the incident immediately. This criticism of Govender's actions is, however, at odds with the conclusion reached by the Arbitrator that Govender had a motive to implicate Zitha. If that had been so, it is equally unlikely that he would have waited 3 hours before he reported the incident to management. Mr. Hutchinson also argued that Govender's explanation that he was fearful of reporting a colleague was reasonable particularly in this country where intimidation is widespread. He also submitted that the fact that Zitha had tried to bribe Govender served to show that Zitha would have gone at great lengths to keep Govender from reporting the incident. Why this fact should caution the Arbitrator from accepting Govenders' evidence is difficult to understand. It is also difficult to understand why a negative inference should be drawn from the fact that Govender did not collect evidence. It is clear from Govender's evidence that his sole purpose was to report the incident and not to gather

evidence. This is also borne out by the fact that he had spoken to several of his co-employees before reporting the incident to management.

(iii) The Arbitrator was also critical of the affidavit deposed to by Govender. She also found that the Applicant had regarded the affidavit deposed to by Govender to be "*the ultimate deciding factor*" whereas the probative value of such an affidavit is questionable. The Arbitrator then went on to evaluate the evidence of Govender in detail. It is clear from the award that she is highly critical of Govender's evidence: For example, the Arbitrator drew a negative inference from the fact that Govender made no mention in his affidavit that clear coat has fallen from the container. However, what the Arbitrator overlooks is the strong corroborative evidence given by Soares who investigated the matter. He gave evidence that he noticed that there were drops of clear coat in the wash bay area where Zitha worked. Moreover, the evidence shows that there was a quantity of clear coat missing and unaccounted for. I also agree with Mr. Hutchinson that it is unreasonable to have treated Govender as a witness as a single witness and therefore treat the evidence with caution yet at the same time ignore

> corroborating evidence. The fact that evidence of drops of clear coat was found by Soares in the washing area and the fact that clear coat was missing are factors that should have been taken into account by the Arbitrator. The fact that this evidence existed and which was not of the making of Govender, also renders the conclusion that Govender had fabricated a story completely unreasonable.

[12] Regarding the evidence of Zitha, the Commissioner crisply concluded that he offered a credible explanation and that he did not contradict himself on material issues.

[13] I am in agreement with the submission that the Arbitrator erroneously relied on the cautionary rule in respect of single witnesses. I am further in agreement that this amounted to a material legal error and constituted a gross irregularity in the proceedings and resulted in the Applicant being denied a fair trail. More in particular, I am in agreement that this erroneous approach had a material influence on the ultimate outcome of the proceedings as the ultimate "*purpose of the cautionary rules is to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt*" (*Law of Evidence* at 798). The cautionary rule against a single witness cannot be applied as a

general rule. See in this regard *S v Sauls & Others* 1981 (3) SA 172 (A) at 180D-G:

> *"In R v T 1958 (2) SA 676 (A) at 678 OGILVIE THOMPSON AJA said that the cautionary remarks made in the 1932 case were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that these remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by s 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to "the single evidence of any competent and credible witness"; it provides merely that*
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> > *"an accused may be convicted on the single evidence of any competent witness".*
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> *The absence of the word "credible" is of no significance; the single witness must still be credible, but there are, as Wigmore points out, "indefinite degrees in this character we call credibility". (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in S v Webber 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether,*

despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean

> *"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"*

(Per SCHREINER JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense".

[14] Case law and the Civil Proceedings Evidence Act 25 of 1965 also confirm that reliance may be placed on a single witness. See *Daniels General Accident Insurance v Co Ltd* 1992 (1) SA 757 (C) where the Court held that:

> *"It is of course competent for a court to find in favour of a party on the strength of the evidence of a single witness - s 16 of the Civil Proceedings Evidence Act 25 of 1965, which provides that judgment may be given in any civil*

proceedings on the evidence of any single competent and credible witness."

[15] It is clear from the authorities that the cautionary rule only applies in circumscribed circumstances and is confined to criminal proceedings. It has no place in civil / arbitration proceedings.

[16] I am thus of the view that the reliance on the cautionary rule in the manner in which it was done by this Arbitrator was misplaced and resulted in a decision which no reasonable commissioner could have arrived at.

[17] Apart from this misplaced reliance on the cautionary rule, I am of the view that there are other reasons why the award reached is not reasonable. The Arbitrator's assumption that Govender bore a grudge is not supported by his own very clear evidence. He testified that he had written off the money that was owed to him and that he had not complained to Soares about it. Soares also confirmed that there was nothing wrong with the relationship between Govender and Zitha. The conclusion that Govender fabricated the story amounts to complete speculation. The Arbitrator's criticism to the effect that Govender did not obtain physical evidence is equally misplaced. In conclusion, the Arbitrator also overlooked strong

corroborating evidence that supported Govender's claim. When Soares investigated the matter, he noticed that there were drops of clear oat in the wash bay area where Zitha worked. Soares also confirmed with the painter that clear coat was missing.

[18] I am in light of the aforegoaing persuaded that the decision arrived at by the Arbitrator is unreasonable. I am willing to substite the award by a decision that the dismissal of the Third Respondent was fair.

[19] In the event the following order is made:

1. The application for condonation for the late service of the review application on the Third Respondent's representative is granted.

2. The dismissal of the Third Respondent Samuel Boesman Zitha was substantively fair.
3. There is no order as to costs.

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AC BASSON, J

5 May 2009

On behalf of the Appliant:

W Hutchinson. Instructed by Fluxmans Attorneys

On behalf of the Respondent:

H Sibyi. Instructed by Themba Mabasa Attorneys.