IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO JR 967/09

In the matter between:

TRANSZANIET CC t/a OGIES KOLE TRANSPORT Applicant

and

KATE MATABOGE N.O. First Respondent

NATIONAL BARGAINING COUNCIL
FORT HE ROAD FREIGHT INDUSTRY Second Respondent

PHILLIP KHULUMANI MOTSWENI Third Respondent

JUDGMENT

COETZEE AJ:

Introduction

1. This is an application to review and set aside an arbitration award in which the Commissioner held the dismissal to be substantially and procedurally unfair awarding Third Respondent payment of six months remuneration as compensation.

Background

2. The Applicant's case is that the decision reached by the Arbitrator is not one that a reasonable decision maker could have reached.

3. The crux of the Applicant's contention is that the Arbitrator failed to consider material evidence and incorrectly considered the probabilities.

4. The Employer (Applicant) called one witness in the arbitration.

5. The witness testified that the Company had an agreement with its employees of which the Third Respondent (the Employee) was one, to work on certain Saturdays.

6. The Employee worked for a period of 8 years on Saturdays as he was obliged to do in terms of the oral agreement with the Employer.

7. From March 2008 he refused to work on Saturdays.

8. When confronted with his unauthorised absence he said that he was ill and could not work. The employer issued him with a warning.

9. On a further occasion he failed to tender any excuse. According to this witness he at no time alleged that he did not have to work as he was not contractually obliged to work on Saturdays.

10. Another explanation of the Employee, according to this witness, was that there had been an allegation of theft levelled against him and that he would only commence work again when the allegation had been addressed.

11. The witness further testified that provided valid reasons were given in advance the Employees were excused from working on a Saturday.

12. The employee in his evidence stated that he refused to work because of the alleged allegation of theft made against him. He repeated the excuse that he was ill and could not work.

13. The employee further testified that he was called before a disciplinary enquiry for an absence agreed to buy the company. The company denied this. This was not put to the company witness in cross-examination either.

14. The evidence for the company was that a disciplinary enquiry was duly convened and attended by the Employee assisted by a Shop Steward.

15. The Arbitrator held that the company disciplinary hearing was not properly constituted and hinged on unfair and arbitrary grounds and was therefore unfair. The finding appears to be based upon the fact that there was no substantive reason for the dismissal. There is no indication of any unfairness with regard to the procedural aspects.

Legal Principles

16. The dispute is whether the Employee was obliged to work on Saturdays, or whether it was optional, and whether he in fact refused to work.

17. The Arbitrator must consider all relevant evidence and weigh up the probabilities if necessary to establish whether the Employer has discharged the onus of proof in justifying the dismissal.

18. The Arbitrator held on a balance of probabilities that the Employer did not discharge the onus of proof in proving that the Employee was obliged to work on a Saturday.

19. The Arbitrator reason that if the Applicant was required (obliged) to work on Saturdays in terms of his conditions of employment he would not have been given an option to do so as the witness for the Company testified that the Employee was not required to work every other Saturday if he gave reasons in advance. On that argument, the arbitrator held that it is probable that there was no obligation to work on Saturdays.
20. The assumption is incorrect as the evidence was that the Employee is needed to give a valid excuse in order to be excused from working on a Saturday. This can only mean that there is an obligation to work on Saturday unless excused.

21. The Arbitrator further reasoned that it was optional for the Employee to work on Saturdays as the company paid its employees whether or not they worked on Saturdays. The witness for the company in fact testified that the employee was paid 1.5 times the actual rate for Saturday work irrespective as to whether the hours worked on a Saturday were in fact overtime over and above normal hours. This can mean only one thing and that is that there is a special rate for work on Saturdays and that the Employee was paid according to that rate.

22. The Arbitrator in addition concluded that because under common law as

well as "the employment practice" and employees required by law to give an employee all basic conditions of employment in writing and because it was not done in this case it is an indication that the condition of employment relied upon by the company did not exist. This reasoning is not logical.

23. The following factors and evidence are relevant:
23.1. The Employee worked Saturdays for a period of 8 years until he suddenly refused to work from March 2008
23.2. The Employee informed the Employer that he was ill and could not work and thereafter tendered other excuses.

23.3. The Employee also said that he would resume work on Saturdays when the allegation of theft made against him had been resolved.
23.4. The evidence of the Employer was that there was an oral agreement to work.

23.5. The Employee's evidence was that there was no such a contract in place.

23.6. The Employee in cross-examination stated that he refused to work, because he had been accused of theft and the accusation had not been resolved.

23.7. Employees did not have to work on Saturdays provided they had tendered an explanation beforehand.

24. The Commissioner concluded that on a balance of probabilities the Employer had not discharged the onus to prove the existence of a condition of employment that the Employee was obliged to work on Saturdays.
25. The Commissioner accepted the Employee's denial of an agreement to work overtime on Saturdays as the more probable version.

26. It is clear from a reading of the arbitration award and considering the evidence that the Arbitrator did not give careful consideration to the evidence and the probabilities in arriving at her conclusion.

Finding

27. The Arbitrator clearly had not applied her mind to the onus of proof and the balance of probabilities and the award is one that a reasonable Arbitrator could not have made.

28. On the evidence and the probabilities there is only one outcome and that is that there was an oral agreement obliging the Employee to work on Saturdays. The dismissal was substantively fair.

29. The finding that the dismissal was procedurally unfair is based upon a finding that there was no substantive fair reason for the dismissal. This finding is not based upon any evidence.

Order

Accordingly, an Order is made on the following terms:

30. The arbitration awards made by the First Respondent on 23 January 2009 under case number MPRFCB 2642 under the auspices of the Second Respondent is reviewed and set aside.

31. It is ordered that the dismissal of Third Respondent was substantively and procedurally fair.

32. No order is made as to costs.

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COETZEE AJ
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	20 DECEMBER 2010
DATE OF JUDGMENT:	22 December 2010
APPEARANCES:	
FOR APPLICANT:	C. PRINSLOO instructed by Vogel Malan Attorneys
FOR THE RESPONDENT:	Unopposed