THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not reportable

Case no. JR 601/11

In the matter between:

FILTER AND HOSE SOLUTIONS

A DIVISION OF HUDACO TRADING (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER N MBHELE **Second Respondent**

CEPPWAWU obo P SEKHWELA **Third Respondent**

Heard: 7 January 2014

JUDGMENT

WILKEN, AJ

Introduction

[1] This is an application in which the Applicant ("the Company") seeks to

review and set aside an arbitration award issued by the Second Respondent ("the Commissioner") issued on or about 6 February 2011 finding that the dismissal of Phusha Sekhwela ("the Employee"), was procedurally fair but substantively unfair, and reinstating the Employee and ordering the Company to pay the Employee R27000.00 in back pay.

Condonation

[2] The Third Respondent ("CEPPWAWU") representing the Employee sought condonation for the late filing of its answering affidavit. A substantive application as filed in this regard and the issue of condonation was vigorously opposed by the Company.

[3] The arbitration award, being the subject of this review was issued on or about 10 February 2011, and the Company served and filed its review application on or about 24 March 2011. There was a delay in presenting the review arising from the need to make an application to compel the CCMA to deliver the whole record. The Rule 7A(6) and Rule 7A(8) notices were filed in court on 18 October 2012, some three months after compliance by the CCMA in delivering the disks containing the mechanical recording of the proceedings.

[4] CEPPWAWU filed its Answering Affidavit on 24 January 2013 which according to proper calculation amounts to a delay of 56 days. The explanation tendered by CEPPWAWU for the late filing not only lacks detail but does not explain why steps were only taken during December 2012 to obtain instructions whether the application for review should be opposed.

[5] The Company further makes much that the application for condonation was only served and filed in March and contends that that in itself demonstrates that the union had no intention of opposing the review and that condonation for the late filing of the answering affidavit, should on that basis alone be denied.

[6] The test for granting condonation requires the court to consider a number of factors, and it is trite when exercising its discretion to grant or refuse condonation, the court should not have regard only to one of the factors, but make its decision having regard to all the factors relevant to the granting of condonation.[1]

[7] Whilst the delay is not insignificant and the explanation not a full explanation for the delay, this must be balanced against the prospects of success and the prejudice which the Applicant suffered or may have suffered as a result of the late filing of its opposition to the review application. Considering that some 20 months lapsed since the date of the award to the company finally filing its affidavit, and it having taken almost 3 months in having the record transcribed and filing its supplementary affidavit, it is evident that the Applicant suffered little, if any, prejudice by the delay of 56 days in CEPPWAWU in filing its answering statement. Furthermore, considering the grounds of review, the *prima facie* prospects the Employee has in opposing the review, and the opposition to the review enabling a proper ventilation of the dispute, condonation is granted.

Background

[8] The Employee was dismissed following a disciplinary inquiry on or about 16 August 2010 on charges of:

8.1 "theft";

8.2 "disobeying of a direct order".

[9] The complaint of theft arises from the Company's contention that the Employee used the funds advanced on long distance trips to make fictitious fuel purchases as the distances covered against fuel consumed was far in excess of the manufacturer's specifications. Accordingly, the Company concluded that the Employee was guilty of theft of company

[1] *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 at 532 C-F and *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC)

funds utilised to purchase the fuel the company contended could not reasonably have been used by the Employee when executing his duties for the Company.

Arbitration proceedings

[10] The Employee challenged his dismissal successfully in the CCMA.

[11] The documents before the court do not include the proceedings in the disciplinary hearing. To the extent that the Company referred to, or partially challenged the Employee on the evidence given by him at the disciplinary hearing, the court was not able to come to any conclusion as to whether certain issues were indeed raised or whether the Employee had a different defence or had admitted certain issues as contended for by the Company during the disciplinary hearing. To the extent that reliance was placed on Venter's evidence at the disciplinary hearing during the arbitration proceedings the court has not had the benefit of Venter's version as he was not called as a witness at the arbitration proceedings nor is the disciplinary proceedings record available.

[12] No evidence of whatsoever nature was led during the arbitration proceedings concerning the complaint put to the Employee regarding him allegedly having disobeyed a direct order. To the extent that he may have been found guilty of this complaint, and it is not clear from the notice of dismissal whether he was, no evidence was produced at the arbitration proceedings which would justify him being found guilty of such complaint. Such alleged misconduct can therefore not be taken into account in determining this matter.

[13] The Company called two witnesses, one Bertus Nienaber ("Nienaber"), the assistant to the warehouse manager and one Martin Peterson ("Peterson"), the financial director and chairman of the disciplinary hearing.

[14] Nienaber gave evidence with reference to the bundle of documents put up

by the Company. The documents consisted of a summary of fuel purchases during July 2010, summaries of distances travelled on the days fuel was purchased and the average consumption on these trips undertaken by the Employee. Nienaber contended such evidence demonstrated that the Applicant's vehicle was using excessive fuel as its consumption far exceeded the consumption the manufacturer gives out as the average consumption for such vehicle.

[15] Nienaber further gave evidence comparing C-Track trip reports (a vehicle tracking system) and comparing the position of the Employee's vehicle from time to time when fuel was purchased by the Employee, or the Employee passed through toll gates. The Company relied on such evidence to contend that the Employee could not have been at the location where the fuel was purchased as the vehicle tracking system, placed the Employee at a different location.

[16] Nienaber further gave evidence that he personally telephoned the Toyota dealer to obtain the average consumption of a vehicle such as the Employee was driving and that the dealer allegedly emailed him confirmation of the average use of a vehicle such as the one the Employee was driving. That email was not introduced into evidence by Nienaber.

[17] Nienaber also testified that one of the purchases for fuel related to petrol being purchased, but once again, that fuel slip was not tendered into evidence at the arbitration proceedings.

[18] Nienaber gave evidence that the vehicle had to be serviced every 10,000 kilometres, but if regard is had to the service record it is evident that the vehicle was only serviced every 20,000 kilometres. The Applicant contended that the service record demonstrated that the vehicle had no faults which would explain the alleged excessive fuel consumption compared with that given by the manufacturer.

[19] Under cross examination it was put to Nienaber that his contention that the

Employee was not at the filing station when fuel was purchased (the slips tendered by the Employee to explain the usage of petty cash given to him) wrong and based upon an incorrect interpretation of the C-track report. The C-Track report reported a location at the end of the trip and accordingly the end time of the trip should be compared with the time on the fuel slip rather than start time of the trip.Nienaber's evidence as to the location of the Employee's vehicle not being where he contended it to be was therefore not supported at all by the documents he relied upon.

[20] Insofar as Nienaber's contention that the vehicle's fuel usage was excessive, he admitted under cross examination that he did not perform any test with the vehicle to determine the vehicle's actual consumption, nor did he take any steps to determine whether the vehicle's fuel consumption was in accordance with the manufacturer's assessment of average consumption for such vehicle.

[21] Nienaber's evidence was quite unsatisfactory and it was evident that he was called upon to give evidence on documents which he was neither familiar with nor understood at all. His recollection of events is also rather spectacularly inadequate, one such incident being demonstrated by the following extract from his evidence:

> *'MISS M S ROELOFSE:* What was the expected fuel consumption on the vehicle the Applicant drove?
>
> *MR NIENABER:* According to the dealership Toyota in Boksburg, it is between 11 to 12 kilometres per litre.
>
> *MR RAMOTHATA:Repeat that.*
>
> *MR NIENABER:* According to the dealership Toyota Boksburg, they said it is the fuel consumption, it is an average between 10 to 11 kilometres per litre'.

[22] Nienaber's evidence was equally unsatisfactory when he was questioned about the factors which could influence fuel consumption. He was only

able to tender the possibility of theft or a fault to the vehicle as an explanation for consumption above the expected manufacturer's/dealer's average. Under cross examination he immediately conceded other factors could also influence consumption such as speed.

[23] The final nail in Nienaber's evidence was his concession that there was no evidence at the disciplinary hearing demonstrating that the Employee was guilty of stealing. The following extract is quite instructive in this regard:

> *'MR RAMOTHATA:* So, the opinion that you are holding was informed, or if you had not done that what informed opinion that you raised that these people were stealing the diesel?
>
> *MR NIENABER:* I did not say he was stealing, I said there was a problem with the truck. The only problem that I can think of is stealing because if you can see your slips, fuel consumption, all of that, it is not corresponding, that is why I made, the suspected I think it is stealing'.

[24] The Company's only other witness was the chairman of the disciplinary hearing, Peterson. Apart from his evidence in chief and cross examination concerning the procedural fairness of the disciplinary hearing (which was not being challenged in the review proceedings), he gave no evidence in chief which could assist the Company in proving the Employee's guilt on the complaint of theft. The sum total of his evidence in chief in relation to the matter to be determined by the court was:

> *'*MISS ROELOFSE: How did you reach your decision to dismiss Mr Sekhwela?
>
> MR PIETERSON: The company presented evidence with regard to fuel consumption relative to kilometres driven and based on that evidence I reached the conclusion that Mr Sekhwela should be dismissed.
>
> MISS ROELOFSE: While presenting the evidence did Mr Sekhwela dispute the evidence presented by the employer?
>
> MR PIETERSON: Mr Sekhwela denied any theft of monies that is the

extent of his dispute'.

[25] In cross examination, Mr Peterson conceded that he had no direct knowledge regarding any theft by the Employee, nor was he able to say how much money it is alleged that the Employee had stolen. Interestingly enough, when questioned about the vehicle's excessive consumption giving rise to the suspicion of theft, he testified that it was one Venter who gave such evidence before him. In view of Petersen's evidence, Nienaber's evidence at the arbitration must, in the circumstances, be viewed with considerable circumspection. Peterson also conceded that the Employee was never confronted about his alleged excessive consumption when he presented his fuel vouchers for reconciliation and conceded that the Employee denied that he had stolen any cash as contended for by the Company at the disciplinary hearing.

[26] The Employee testified that the petrol voucher relied upon by the Company to contend that he presented a fictitious voucher to demonstrate that he had purchased petrol instead of diesel was only raised with him at the disciplinary hearing and that that voucher was almost illegible. He denied ever handing in that slip or any slip in respect of the purchase of petrol and stated that he was never challenged during any reconciliation meeting done on a daily basis that he had presented a petrol voucher or fictitious voucher.

Grounds of review

[27] The Applicant seeks to review the Commissioner's arbitration award on the basis that her finding was disconnected with the evidence and that the Commissioner did not apply her mind in assessing the evidence.

[28] The nub of the Company's attack on the Commissioner's award is that the Commissioner disregarded the evidence by the Company's witnesses concerning the excessive fuel consumption and erred in disregarding the hearsay evidence of the Company as to the average fuel consumption. It

is further contended the Commissioner committed gross misconduct in failing to accept the evidence given by Nienaber concerning the analysis of the fuel consumption, and Nienaber's evidence on the probability of the Applicant not having been at the places where fuel was purchased at the time and place that the fuel slip evidenced, having regard to the vehicle tracking system (C track report).

Test on review

[29] The Commissioner's decision stands to be set aside upon review if the decision made by the Commissioner is one which a reasonable decision-maker could not reach.[2] It has now been authoratatively stated by both the Supreme Court of Appeal and the Labour Appeal Court that when considering the Commissioner's decision, the court should not adopt a piece-meal approach and set aside the Commissioner's decision merely because the Commissioner may have erred in one respect or another, but that the court must only set aside the Commissioner's decision when such decision is one a reasonable decision maker could not take having regard to all the material before the Commissioner.[3]

Evaluation

[30] The Applicant contends that the Commissioner's finding that the Applicant ought to have called the dealer to give evidence as to the average fuel consumption (such as the one driven by the Employee) demonstrates the Commissioner erred in applying the legal principles in assessing the evidence presented. Given the evidence of Peterson that it was Venter who presented that evidence at the disciplinary hearing and not Nienaber, Nienaber's assertion that he called the dealer must be viewed with great circumspection, especially in circumstances where the Applicant took no effort to present the alleged email from the dealer, especially given that

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] (12 BLLR 1097 (CC) at para 110.
[3] *Herholdt v Nedbank Limited* (2013) 34 ILJ 2795 (SCA) and *Goldfields Mining SA (Pty) Ltd v CCMA and Others* (JA 2/2012) 2013 ZALAC 28 (4/11/2013).

Nienaber was challenged in this regard on 7 December 2010 and Peterson only gave evidence on 17 January 2011.

[31] As indicated above, Nienaber's evidence regarding the average consumption was in any event questionable as he gave two versions as to the average consumption. The consumption the Applicant contends for was at best speculative.

[32] The Applicant failed to demonstrate the actual consumption of the vehicle in question in circumstances where it could readily have done so. Under cross examination, it was put to Peterson that the calculation of the average consumption would be inaccurate if no record is available as to what fuel was in the vehicle at the time the Employee commenced the journey and no regard was heard as to the fuel left in the vehicle at the end of the journey. In addition, much is made that the vehicle the Employee had driven used more fuel than similar vehicles driven by other drivers, but no such evidence was ever tendered. Considering the test to apply in relation to circumstantial evidence, it cannot be held that the Commissioner erred in evaluating the evidence as the inference the Company contended for was not the only reasonable plausible influence to be drawn, nor was it in any event based on fact.

[33] As indicated above, the Applicant's reliance on the C-Track report to place the Applicant at different locations at the time he fills fuel into the vehicle, is based on an incorrect interpretation of the C-Track report.

[34] For all the reasons set out above, I do not believe that the Commissioner committed a reviewable irregularity nor is the award one a reasonable decision maker could not have reached having regard to the material before him.

[35] I am mindful that costs do not necessarily follow the result in labour proceedings.[4] However, in the current matter it is one where it would be

[4] *Ball v Bambala Bolts (Pty) Ltd and Another* [2013] 9 BLLR 843 (LAC).

appropriate to award costs to the Employee, given that:

1. the Applicant's witness, Nienaber conceded that he was unable to prove that the Employee was guilty of theft;

2. the Applicant's witness, Peterson, the financial director, could not state the value of the theft, nor was he able to state whether fuel and/or cash was stolen;

    a. the Employee was dismissed for theft and failing to obey a direct order in circumstances where there was no evidence presented of any theft or him disobeying a direct order;

    b. the Applicant persisted at the arbitration proceedings, in the review papers and to a lesser extent in court that the C-Track report demonstrated that the Employee could not have been at the place where he put fuel into his vehicle as the fuel purchase slips showed him to be at a different location, notwithstanding it having been pertinently pointed out to Applicant's witnesses during the arbitration proceedings that its reliance on the C-Tract report was misguided.

[36] For all of the above reasons, the Company's case was without prospects which put the Third Respondent unnecessarily to the trouble and expense of pursuing the proceedings.

[37] Furthermore, by pursuing a review with no prospects of success, it kept the Employee not only out of employment, but deprived him of his income from the date of his reinstatement order, which has no doubt caused considerable hardship to the Employee and those who depend upon him.

[38] I accordingly, issue the following order:

1 the review is dismissed;and

2 the Applicant is to pay the Third Respondent's costs on a party and

party scale excluding the costs in relation to the application for condonation.

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Wilken, AJ

Acting Judge of the Labour Court of South Africa

23 January 2014

APPEARANCES:

FOR THE APPLICANT:	Attorney PJ Strydom of Jarvitz Jacobs Raubenheimer Inc.
FOR THE THIRD RESPONDENT:	Advocate N Basson instructed by Cheadle Thompson Haysom Inc.