IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN BRAAMFONTEIN

CASE NO: JR 797/01

In the matter between:

Mutual Construction Company
TVL (Pty) Ltd **Applicant**

and

Commissioner. Ntombela N.O **1st Respondent**
Commission for Conciliation, Mediation
and Arbitration **2nd Respondent**
Thokoane Joseph **3rd 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 which the first respondent issued on 14 May

2001 while he was acting under the auspices of the second respondent. The application is opposed by the third respondent.

Background facts

[2] The Third respondent commenced employment with the applicant on 16 January 1997 as a labourer. He was later promoted to the position of an administrative clerk. He was responsible for the recording of all hours worked by employees. Such recordal was used by the applicant as a basis for the calculation of payments for its employees in that section. The third respondent had to record the hours which he himself would have worked. He would use a time sheet for such recording which he would then present to the mine manager. It would only be after the mine manager had appended his signature on the time sheet that the sheet would be used to calculate payments of employees.

[3] On 3 June 1999 the third respondent did not report on duty. On his return to work, he brought along a medical certificate. He had been booked off sick from 3 June 1999 to 5 June 1999 by a doctor. He then completed his time sheet as if he was on duty on 3rd to 5th June 1999 but only claimed for the 3rd and 5th June 1999.

[4] On 25 June 1999 the applicant issued a notice to attend an internal disciplinary hearing and served it to the third respondent who was to attend the enquiry on 29 June 1999 on charges of dishonesty; breach of trust and of actions taken in bad faith. He was then found to have committed all the acts of misconduct with which he had been charged whereafter, on 30 June 1999 he was dismissed. A dismissal dispute arose between the applicant and the third

respondent which dispute was referred to the second respondent for conciliation. At conciliation the dispute could not be resolved and the third respondent referred it for arbitration, on the strength of a certificate of non resolution issued on 13 August 1999.

[5] The arbitration hearing commenced with Commissioner Nel as the arbitrator, Mr Bates of the employers' organisation appeared for the applicant. Mr Matatshawane from the trade union, FAAWU, appeared for the third respondent. Mr Bates confirmed that the applicant was admitting that the third respondent was dismissed. When he was invited to make an opening statement, Mr Matatshawane objected to the presence of Mr Bates. Mr Nel asked for credentials from Mr Bates who produced a certificate of appointment and Mr Nel was satisfied. He ruled that the hearing was to proceed. Mr Matatshawane threatened to review the ruling. Mr Nel finally stopped the hearing to allow a review of the ruling. It would appear that correspondence was then entered into between the parties and the second respondent, the Commission for Conciliation, Arbitration and Mediation ("the CCMA"). The arbitration hearing later resumed with the first respondent as the arbitrator.

Arbitration proceedings

[6] The applicant called two witnesses, Mr Vos and Mr Bings. The applicant's case was that:

- When an employee came to work, he would be directly under the supervision of a foreman. The foreman would complete the time card daily. There would be cases where a

clerk would complete the time card, depending on the type of work performed by the employee.

- The time card would then be given to the clerk who in turn would transmit the information from the time card into a monthly time sheet.
- The clerk would then submit the time sheet to the mine manager who had to check the time sheet and then authorise it by signing the same.
- The signed time sheet would then be submitted to the salaries department, which in turn, would rely on the time sheet to generate a monthly payment of each employee.
- Most employees were paid per hour worked and the time sheet provided the total hours which an employee would have worked for each month.
- There are days when the third respondent did not report for duty. After he had returned to work, he then recorded certain hours on the time sheet as if he had been at work. Such days were on:

    - 29 May 1999 – 9 hours were recorded;
    - 30 May 1999 – 8 hours were recorded;
    - 31 May 1999 – 11, 5 hours were recorded;
    - 1 June 1999 – 11, 5 hours were recorded;
    - 3 June 1999 – 11, 5 hours were recorded;
    - 5 June 1999 – 9, 5 hours were recorded;
    - 6 June 1999 – 10 hours were recorded and
    - 7 June 1999 – 11, 5 hours were recorded.

- There are days on which the third respondent altered recorded hours. These are;

- 8 June 1999 – 9, 5 hours changed to 11 hours;
- 9 June 1999 – no particulars given;
- 10 June 1999 – no particulars given;
- 11 June 1999 – 9, 5 hours changed to 11,5 hours;
- 14 June 1999 – no particulars given;
- 18 June 1999 – 11, 5 hours changed to 14 hours;

- The original time sheet was at the office and from it the alterations could clearly be seen.
- During the disciplinary enquiry, Mr Bings was the chairperson but he also took down notes. Mr Bings was not the complainant as mistakenly reflected in the notes. Mr Mashego was the person who had complained to Mr Bings about the third respondent. Mr Bings then drew a notice of the enquiry and served it to the third respondent.
- The third respondent chose not to be represented. He then pleaded not guilty to the charges whereafter he was asked to give an explanation. The explanation he gave was an admission that he had committed the misconduct with which he was charged. Such misconduct related to the events of 1999 and not those of 1997. The events of 1997 were merely an explanation of why he committed the 1999 acts.
- No statement was taken from the complainant due to the fact that the third respondent had admitted to the acts of misconduct with which he was charged.
- The company stood to lose R 600 to R 700 from the hours which were falsely claimed by the third respondent.
- In terms of the company code of conduct, dishonesty was a dismissible offence. The applicant would not consider

reinstatement of the third respondent due to the trust relationship having broken down and that the applicant had already placed someone else in the position of the third respondent. The person taken had been with the applicant for six years.

[7] The third respondent was the only witness who testified for his case. His evidence was to the effect that:

- The days on which he was absent from work were not exactly the same as alleged by the applicant. He was absent on:

  30 May 1999, 3 June 1999; 4 June 1999, 5 June 1999 and 6 June 1999.
- The only days for which he was charged at the internal disciplinary hearing were the 3rd and 5th of June 1999. He was hearing allegations on the other days for the first time during the arbitration proceedings.
- He was never given the time sheet at the internal hearing which the applicant claimed he had changed.
- Upon his return to work he submitted a time sheet wherein he only claimed hours as if he worked only for 3 June 1999 and 5 June 1999. However he attached to the sheet, a medical certificate to indicate to Mr Bings to whom the time sheet was given, that he had been off sick but expected it to be a paid off sick.
- He completed working hours due to an earlier incident during which he was off sick but was not paid. This was in 1997.

- He deliberately claimed for two and not three days to see if he would be paid as he had previously not been paid for 5 days during which he was off sick.
- The normal working hours per day were 9, 5 hours but in this case, he usually worked 11, 5 hours. For 3 June 1999, he claimed for 9, 5 hours.
- The notice to attend the inquiry had three charges. However there was no explanation on when and how these were allegedly committed.
- At the internal disciplinary hearing, Mr Mashego was present but played no role. Mr Mashego was therefore neither used as an interpreter nor as a complainant.
- There is a co-employee who was to have represented him during the hearing but the company did not allow such co-employee to come to the hearing to represent him. It was therefore not true that he had chosen to represent himself. He conceded though, that he did not ask for the matter to be postponed so as to procure representation.
- When the enquiry started, Mr Bings explained the nature of the allegations against him. He then pleaded not guilty. Mr Bings asked him to explain what had happened. He explained and Mr Bings reduced the explanation into writing and gave it to him to sign. He signed it. That statement was not the same one which was produced at the arbitration hearing as he had clearly not pleaded guilty. Mr Mashego had played no part in the pleading proceedings.
- The minutes of the proceedings which were kept by Mr Bings correctly reflected that he had pleaded not guilty.
- He did not know who it is that had altered the entries in the time sheet as alleged by the applicant.

The Arbitration award

Substantive fairness

[8] The first respondent found that the applicant had failed to explain why the original time sheet was not given to the third respondent during the disciplinary hearing. He found that the applicant had also failed to bring the same during the arbitration proceedings. He found that the third respondent had emphatically denied the allegation of changing certain hours on the time sheet. He said that it was difficult to see how these hours were changed in the absence of the original time sheet.

[9] He noted that Mr Bings had actually signed the time sheet, basically, in his view, confirming that the information on the time sheet was correct and that employees were to be paid. He said that his logic informed him that a manager had to satisfy himself that the information was correct before signing any claim. He noted that the person who had supposedly discovered that the third respondent had booked the hours on the time sheet when he was not at work, was not called by the applicant to come and testify during the arbitration proceedings. He then found that, on a balance of probabilities, the evidence of the applicant was not convincing. His finding was that the third respondent was dismissed not for a fair reason.

Procedural fairness

[10] The first respondent found that the applicant did not properly explain the charges that were put against the third respondent. The example was the charge of dishonesty in respect of which the

charge sheet did not explain why it was alleged that the third respondent was dishonest. He said that it was the responsibility of the applicant to ensure that the charge was not ambiguous. He said that failure by the applicant to explain the charges on the charge sheet had a negative impact in the third respondent's preparation of his case.

[11] He rejected a claim by the applicant that Mr Mashego was the complainant during the disciplinary hearing and found, as appeared in the notice of the hearing that Bings was the complainant even as he was the chairperson in the disciplinary hearing. He found that the taking of the minutes by Mr Bings was in breach of applicant's procedures.

[12] After the third respondent had pleaded not guilty, the chairperson ought, in terms of applicant's disciplinary procedures, to have allowed the complainant to proceed with his case, by stating the facts which led to him bringing the case against the third respondent. This, he found never happened which was a further breach of the applicant's procedures. He accepted the evidence of the third respondent that the statement which the applicant said was made by the third respondent during the disciplinary hearing, was not his statement. He found then that the procedure which the applicant followed was grossly unfair.

[13] He rejected the submission by the applicant that the working relationship and trust no longer existed between the parties. He found that the dismissal of the third respondent was both procedurally and substantively unfair. He then ordered the applicant to reinstate the third respondent with retrospective

payment. It is this finding and the order which aggrieved the applicant, leading to the present application.

Grounds for review

[14] This application is premised on the submission that the first respondent:

(i) committed gross irregularities and

(ii) issued an award which is neither rational nor justifiable.

Analysis

[15] The finding by the first respondent that:

> "(i) the original time sheets were not produced in the arbitration, and as a result it was difficult to see how the hours were changed and;
>
> (i) As the mine manger, Mr Bings, signed the document, he must have obviously satisfied himself that the document was correct."

was taken by the applicant as a clear indication that the first respondent completely failed to properly determine the evidence before him, thereby committing a gross irregularity.

[16] The contrary submission by the third respondent was that the applicant was saddled with a duty in terms of section 192 (2) of the Act, to have had to prove that the dismissal was fair. The finding by the first respondent was supported as an indication of the failure by the applicant to discharge the duty it was saddled with.

[17] **Crown Chicken (Pty) Ltd t/a Rocklands Poultry v Kapp & others (2002) 23 ILJ 863 (LAC**) at 868 provide an appropriate guide for present purposes. Nicholson JA held that:

> "[19] Arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in S 145 of the Act more especially where the commissioner had committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it is not rationally related to the purpose for which the power was given from an objective view (**Shoprite Checkers (Pty) Ltd v Ramdaw NO & others (2001) 22 ILJ 1603 (LAC) para [26], Pharmaceutical Manufactures' Association of SA & others: In re Ex Parte Applications of the President of the RSA & others 2000 (3) BLLR 241 (CC)** or if it is not justifiable as to the reasons given. See **Carephone (Pty) Ltd v Marcus NO and others (1998) 19 ILJ 1425 (LAC); (1998) 11 BLLR 1093 (LAC) at 1103C.** By rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination. Put differently the arbitrator must have applied his mind to the issues at hand and reasoned in his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order.
>
> As gross irregularity can occur patently where for example the right to cross-examination is denied or latently where the reasoning is so flawed that one must conclude that there has not been a fair trial of the issues. See **Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340 (LAC).**"

[18] In its heads of argument, the applicant submitted that the time sheet was never placed in dispute by the third respondent's union representative and that it was admitted as undisputed evidence. What was admitted as undisputed evidence was a bundle of documents in which there was a copy of the time sheet in question. In my view, this submission by the applicant is a narrow approach to a trial, which is a process and not just an event. Had the applicant adopted a holistic approach in assessing this aspect of evidence, it would have realised that there was a serious problem, during trial, about the copies of the time sheet produced by it. Mr Bates who represented the applicant was the first to be confronted by a problem, during arbitration proceedings, as a result of this failure to produce the original time sheet. At page 46 of the transcript he had this to say:

"**COMMISSIONER:**	Sorry, can I just take you back … (incomplete).
MR BATES :	Yes.
COMMISSIONER:	You said on the 18th of June he changed the hours from eleven and half to fourteen? ---- Fourteen.
MR BATES :	Fourteen. Right. How do you know … (indistinct)? ---well, I put the original that kept with me … (indistinct) originally.
COMMISSIONER:	But … (indistinct) see the original? ---… (Indistinct) original is at the office but you can see it very clearly on the original. As you can see on this one … (indistinct) see that nine and a half … (indistinct) changed to eleven and a half."

[19] As Mr Bates proceeded with cross-examination of the third respondent, the following exchanges took place:

> "**MR BATES** : Why is there time booked for you if you were not there?
>
> **MR THOKOANE**: I really don't know Mr Bates, I do not know who did this, who booked this (sic) hours.
>
> **MR BATES** : Because you can even see on this photocopy if you look on the 30th it is a bad copy, … (Indistinct) copies … (indistinct) see that there was (sic) changes made?
>
> **MR THOKOANE**: Yes that is my question … (indistinct)"

And further on:

> "**MR BATES** : Yes I just said … (indistinct) Mr Bings has testified and I will show you the clear copy, let me show you … (indistinct) here. On the 4th, 5th is nine and half and on the 3rd it is eleven and a half. You see that Mr Thokoane, on the 3rd it is … (indistinct) this is also a copy, much, much clearer copy. You see that on the 3rd … (indistinct) eleven and a half and on the 5th nine and a half?
>
> **MR THOKOANE:** Sir I cannot … (indistinct). You what I booked because this is not an original… (indistinct). On my copy it is not clear … (indistinct) this was a nine and a half or it

> was eleven and a half. I will claim it as together with those days which were on my absence."

[20] When the three incidents I have referred to are considered, it is difficult to conceive of the reasonableness behind the submissions, in this respect, by the applicant. It is patently clear from the record of the arbitration proceedings that the parties did not deal with the authenticity of any documents which formed part of the bundle, when the bundle of documents was handed in. That the time sheet was admitted as undisputed evidence, is therefore, far from the truth. It was the fault of the applicant not to bring the original time sheet to the arbitration hearing. The third respondent's case is that the original time sheet was never produced at the internal disciplinary hearing. When the third respondent complained about the non availability of the original time sheet, Mr Bates did not put it to him that, the original time sheet was shown to him, during the internal disciplinary hearing. I conclude therefore, as I must, that the original time sheet was never shown to the third respondent, from the time he was served with a notice to attend the internal disciplinary hearing. The original time sheet is the very document on which the acts of misconduct, with which the respondent was charged, are premised. The third respondent alerted the applicant of a need to produce the original time sheet, when Mr Bates cross-examined him. Yet the applicant took no remedial steps to cure the deficiency.

[21] Contrary to what the applicant has submitted, it cannot reasonably be said that the reasoning of the first respondent, that, as a result of failure to produce the original time sheet, it was difficult to see how the hours were changed, is so flawed that one must conclude

that there has not been a fair trial of the issues. In my view, no gross irregularity was committed by the first respondent, in this respect. The result is that, the applicant failed, at the arbitration hearing, to prove the infractions with which it had charged the third respondent.

[23] The applicant submitted that the first respondent committed a gross irregularity when he concluded that the signing of the original time sheet by Mr Bings meant that he had obviously satisfied himself that the document was correct. To support its claim, the applicant reduced the status of Mr Bings from that of the Mine Manager to that of the signatory to the document. It suggested that Mr Bings could not check time sheets of all mine employees. It was submitted that the position of the Mine Clerk was one of trust. If there was any merit at all in this submission, the applicant could have given the signing powers to the Mine Clerk. It did not do so because there was a need, reasonably conceived that the work of the Clerk had to be checked by a Mine Manager. It was open, to the Mine Manager to call for some time cards and to use them to do random check on the time sheets. This would unsettle any clerk who might be tempted to falsify entries in the time sheet.

[23] The signing of the time sheets by a Mine Manager was a very critical step in the business of the applicant. It directed the salaries' department to pay an employee on the basis of the hours as were reflected on the time sheet. In the absence of that signature, the salaries' department would be acting contrary to the procedure of the applicant if it continues to generate payment for employees. The Mine Manager had then to satisfy himself that the time sheet was correct. He would be entitled to query any alterations or any

entries in the time sheet which, from his perspective, were a cause for concern. In my view, it was reckless as much as it was irresponsible of the applicant to belittle the role played by Mr Bings in signing the timesheet. The decision of the first respondent was, accordingly justifiable.

[24] The notice of the inquiry served on the third respondent did not explain how and when the infractions were committed. The statement which was produced by the applicant, as having being made by the third respondent, and on the basis of which the applicant said, it found him guilty, speaks only of the 3rd and 5th of June 1999 as entries which the third respondent falsified. Added to this, is the evidence of the third respondent which states that he was only charged with misconduct relating to 3rd and 5th of June 1999 at the internal disciplinary hearing. While the third respondent, in his own evidence, admitted having claimed the hours for the two days as though he was at work, he said that he attached a medical report to the time sheet to alert the applicant of his absence on those days. A copy of such a medical certificate was filed by the applicant on the record of these proceedings. The inclusion of the medical certificate by the third respondent clearly went against any intentions to misrepresent the facts to the applicant. He has explained that in 1997, he was off sick for 5 days. He was not paid for those days as he had not claimed for them. In claiming for the two days as he did, he may have acted contrary to a claim procedure of the applicant, but it was not a misconduct of which he had to be found guilty. When the time sheet was seen together with the medical certificate covering the same period, it should not have been seen as a misrepresentation but rather as a claim for a paid sick leave. The different hours

claimed, do not add much angle to this approach. In his award, the first respondent did not make any particular finding on this evidence.

[25] The comments of Nicholas JA in **Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340 (LAC)** are apposite. He said in paragraph 39:

> "[39] From Dhlumayo's case supra it is clear that the court, in an appeal on facts, will interfere if there are misdirection's of facts including the overlooking of other facts and probabilities. This is very similar to the notion that an award can be set aside if it is not justifiable with regard to the reasons given. By referring to gross irregularity in S 145 of the legislature is already contemplating something far more serious than that. Mistakes of fact and law, subject to certain exceptions, are insufficient grounds for interference."

[26] It is a well accepted principle of law that no judgment or for that matter an arbitration award can be all, embracing – **S v Dhlumayo and others 1948 (2) SA 677 (A) at 702**. The none inclusion in his findings, of the evidence around the claim of hours for 3rd and 5th of June 1999 together with the rendition of the medical certificate, did not, in my view, amount to a sufficient ground for interference. I have, myself, found that the explanation proffered by the third respondent was reasonably capable of an innocent explanation.

[27] I am persuaded by the submissions of the third respondent that the conclusions arrived at by the first respondent are rationally justifiable on the basis of the evidence properly placed before him. He duly applied his mind to the material and he justifiably came to

the conclusion that the dismissal of the third respondent was substantively fair. While some of his findings on procedural fairness were more formalistic, than substantial as I would hold, I would have arrived at the same conclusion as he reached on procedural fairness. It is my view that, I need not take this aspect any further.

[28] The following order will accordingly issue:

The application is dismissed with costs.

CELE AJ

Date of hearing : 03 November 2005
Date of Judgment: 25 April 2006

Appearances

For the Applicant : Snyman Attorneys
Instructed by : Mr S Snyman
For the Respondent: A Barrow
Instructed by : Maserumule Incorporated