



Labour Court s
Private Bag X52
Braamfontein, 2017
86 Juta Street
Braamfontein, 2017

Tel: (011) 359 5769
Fax: (011) 403 9327

To: **Higgs Attorneys**
Applicant's Attorneys
Fax: 086 775 0207

And to: **UCIMESHAWU**
Respondent's Attorneys
Fax: 011 492 1535

Date: **Wednesday, 03 June 2020**

Dear Sirs

JR 963/18 MERIDIAN WINE MERCHANTS (PTY) LTD v/s CLIVE ORLANDO CANHA – JUDGMENT

The above matter refers.

KINDLY be advised that **Bleazard AJ** has instructed that the judgment in this matter be handed down via fax due to the lockdown.

I trust that you find the above in order.

Kind Regards



Sizakele Mkhulise
Judge's Secretary
Labour and Labour Appeal Court
86 Arbour Square Building,
6th Floor Cnr Juta & Melle Streets,
Braamfontein, 2017
Switchboard: 011 359 5765
Email: SMkhulise@judiciary.org.za

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES NO
 (2) OF INTEREST TO OTHER JUDGES: YES NO
 (3) REVISED.

03/06/2020
 DATE

[Signature]
 SIGNATURE



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
 Case No: JR963/18

In the matter between:

MERIDIAN WINE MERCHANTS (PTY) LIMITED

Applicant

and

T HLATSHWAYO N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
 MEDIATION AND ARBITRATION**

Second Respondent

CLIVE ORLANDO CANHA

Third Respondent

Heard: 15 January 2020

Delivered: 03 June 2020

"By Fax"

JUDGMENT

BLEAZARD, AJ

- [1] In this matter, the Applicant seeks to review set and aside an arbitration award by the First Respondent under case number GAJB22265/17, dated 8 May

May 2018, in terms of which the First Respondent found that the dismissal of the Third Respondent was substantively unfair and reinstated the Third Respondent into the employ of the Applicant retrospective to the date of dismissal on 13 October 2017.

- [2] The Applicant was also to make payment to the Third Respondent of the sum of R24,255.00 (Twenty-Four Thousand Two Hundred and Fifty-Five Rand) per month for a period of seven months and that was to be paid on or before 13 May 2018. The Third Respondent was to resume his duties on the same terms and conditions as applied prior to his dismissal on 13 October, 2017.
- [3] Before dealing with the issues raised by the parties, there is one issue that is of concern to me. From the record it appeared that the person representing the Third Respondent at the Arbitration was not entitled to represent him as he was not an official of the Trade Union. The only reference to this in the Award is in paragraph 2 where the First Respondent states:

"2 Gavin Mulvenna, an official of SMIEO employers' organization appeared for the respondent and Thabo Mashioloane, briefly appeared for the applicant, he was later replaced by John Ngubane, an official of UCIMESHAWU"

- [4] The issue, however, dealt with in the record¹ as follows:

COMMISSIONER: Okay, let's check. We're still dealing with the matter of GA15 22265 and I went to verify with Lucky Maloi the locus standi of the Applicant's representative. Now the Union official says they are not aware of his employment. And if that is the case, I want to assure the Applicant I would not be able to allow him to continue with him however, the matter would continue in terms of Shoprite Checkers versus Nqomalo. The CCMA, in such situations, we have an obligation to do what we call a helping hand principle. Which means I'll guide the process, I am not short changing you,

¹ See p. 39, 40 and 42 of the Record.

but at the same time I need to be sure that whoever appears before me has locus standi or what is called legal standing before me. Are you with me?

CLIVE CANHA: Okay.

COMMISSIONER: So I am going to exclude him because the official says he is not known in their midst. And if that is the case I'm going to exclude him however, it does not mean in the least. That your matter has been abandoned or I'm going to short change you because I would not have allowed Mr Mashioane to proceed. But here is, this is Mthembu: Mthembu is an official of e commercial, and when I took this to my case management officer who is a senior manager himself. So he said he would get me the official, here's the official. If the official says he is not known in their midst, I'm going to exclude him as his just said now.

...

COMMISSIONER: So, as a process of verification this is what has transpired. I am also going to allow because we are at the tail end of the what's the. So, that, what I want to assure is that if we exclude a person it does not in the least suggest that your matter it's now being compromised. As a Commissioner, I am not a Judge, I'm not a Magistrate, this is a tribunal. And the Court has made that clear in terms of Impala Platinum [inaudible 00:48:44] so that's why I just want to assure you. Mthembu, I am going to continue just to finish this evidence of the what's a name. And then we'll stand the matter down. So that you know you saw that playing out, in the event that he is not verified to be a Union official, I'll exclude him. And then I do not want to short change the Applicant, I'll stand the matter down and probably just take it that until this is resolved if it sees resolves to be, if not resolved then we may have to come back and deal with your cross-examination."

[5] As can be gleaned from the above, the record is poor (and as I mentioned in Court the lines on the pages are not numbered) but the gist appears to be that Mr Mashioane was not entitled to represent the Third Respondent. Whilst Mr Higgs who appeared on behalf of the Applicant did not seem to be too concerned by this, my view is that this in itself, renders the proceedings before the First Respondent reviewable.

- [6] In the matter before me, on behalf of the Applicant, Mr Higgs raised a number of issues in relation to the Award of the First Respondent. In the Award the First Respondent stated²:

"93. I am persuaded that the charge related to capacity rather than conduct. Hence I am not going to pronounce on this charge since the evidence adduced dealt mainly with capacity related issue."

At paragraph 98 of the Award, the First Respondent stated the following:

"98. I am persuaded nevertheless that the charge again refers to a particular standard that I was not provided with by the Respondent as the Applicant is alleged to have violated a rule."

At paragraph 115 of the Award, the First Respondent stated:

"115. Given the submissions of the parties, I conclude on a balance of probabilities that the applicant's dismissal was unfair in that matters that related to capacity were dealt with as though they are conduct related."

- [7] The gravamen of the argument addressed to me by Mr Higgs was that the issues which were the subject matter of the charges against the Third Respondent related to misconduct and were not capacity related.
- [8] What is clear however, is that whether they were classified as issues relating to capacity or issues relating to alleged misconduct, the First Respondent was required to have regard to them and to decide whether those aspects of the conduct or capacity of the Third Respondent was such that they warranted or did not warrant the action taken by the Applicant.

- [9] In the matter of *Commercial Workers Union of South Africa v Tao Ying Metal Industries and others*³, Ngcobo J had the following to say:

² See para 93 of the Award.

³ (2008) 29 ILJ 2461 (CC) at para 66.

"(66) A Commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a Commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A Commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the Union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a Commissioner will have prior to the hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a Commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in".

[10] Accordingly, it is submitted that whether the matters were capacity related or misconduct issues, the First Respondent was required to apply his mind to those issues to come to a conclusion after having done same. The fact that he elected not to do so constitutes, in my mind, a material irregularity.

[11] The First Respondent indicated that he had not been "favoured" with any standard that the Third Respondent was required to follow but at page 123 of the Record, the following was stated:

"GAVIN MULVENNA: Now, do you ... the content thereof and the requirements that were put to you i.e. the standards of the work, where known to you. What do you say?

CLIVE CANHA: Yes

...

COMMISSIONER: What was your answer there, standard the work was known to you?

CLIVE CANHA: Yes

COMMISSIONER: You say it was known.

CLIVE CANHA: Yes."

In respect of charge 2(a):

"2 failing to comply with lawful instructions from your line manager in that:
(a) you have not completed the Super Spar Monument Project in August and September, 2017"

The First Respondent found:

"107 On reporting for duty he was held up with some backlog thus he did not want only fail to comply but had to act with some time lag. I am persuaded that the Applicant acted with time lag unlike to defy Human instruction.

108 I therefore find that the Applicant did not defy but acted reasonably with some time delay. This, in my considered view, cannot be treated as though it was defiance or just won't failure to comply.

109 I have regard to the fact that the Applicant was suspended and the time frame agreed upon was most likely to be affected."

[12] However, the instruction that the Third Respondent failed to complete was in respect of the Super Spar Monument Project in August and September 2017. The Third Respondent had in fact been suspended from 18 July 2017 until 28 July 2017. The explanation given by the Third Respondent for not having completed the project for August and September 2017 was that he was suspended and he was not around.

[13] It is submitted by the Applicant that there was no causal link between the suspension of the Third Respondent and the failure by the Third Respondent to complete the Super Spar Monument project in August and September 2017 and that the finding by the First Respondent was irrational. There is merit in this submission. A number of issues were raised in the Applicant's Heads of

Argument under the heading of "Bias". The allegation of bias is a serious one against the presiding officer.⁴

- [14] Whilst I am not satisfied that the Applicant has shown that the First Respondent was biased, there is sufficient evidence to justify a finding that the Applicant did not receive a fair hearing from the First Respondent. Of particular relevance is the interchange between the First Respondent and the Third Respondent relating to the "twelve points" which the Third Respondent alleged had been dealt with by the Applicant.
- [15] The First Respondent questions the Third Respondent at length about these from page 179 to page 189 of the Record, at page 189 of the Record, the First Respondent then says:

"COMMISSIONER: from your side Gavin? [Mavenna on behalf of the Applicant] Anything that arises in terms of clarifying question. What is it because it is not a second hind (sic) at the cross examination, it is clarifying to me, what is it that is not clear?"

At page 191 of the Record the First Respondent states the following:

"COMMISSIONER: "Remember, I was entertaining you in respect of what he did not see. It is not in respect of him now otherwise it will go on and on, that way, we won't finish. His given this and the way you said that he did not have a chance or you felt that he did not have an opportunity to clarify, it is clarified. This is not like you are going to re-traverse it. Not, on. It doesn't work that. Guys we've come to the end of the matter and I'm weary of the fact that this is as good as a Friday."

- [16] I am satisfied that the Applicant did not get an opportunity to fully ventilate its case before the First Respondent and, therefore, has been deprived of a fair hearing.

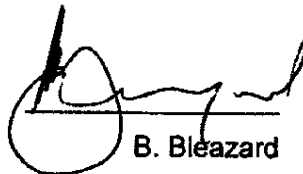
⁴See: *Sappi Kraft (Pty) Limited t/a Tugela Mill v Majake NO and Others* (1998) 19 ILJ 1240 (LC).

[17] Mr Higgs asked me to exercise the Court's discretion to substitute the Award. I do not believe this is an appropriate matter for the Court to do this. Mr Higgs contended that all the evidence has not been led and that his client was prevented from dealing with the evidence in cross examination, there is the issue of the representation of the Third Respondent at the hearing before the First Respondent and, in any event, the record is far from satisfactory. It is, therefore, appropriate for the matter to be remitted back to the Second Respondent to be heard *de novo* before a Commissioner other than the First Respondent. As with the general approach to costs orders in these matters in this Court, I do not intend to make a costs order.

[18] Accordingly, the following order is made:

Order:

1. The award of the First Respondent under Case Number GAJB 22265-17 is reviewed and set aside;
2. The matter is remitted back to the Second Respondent to be heard by a Commissioner other than the First Respondent;
3. There is no order as to costs.



B. Bleazard

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Attorney C Higgs of Higgs Attorneys

For the Third Respondent : Mr John Ngubane, Union Official

LABOUR COURT