

CASE NO. 2790/07

BETWEEN

W B H O CONSTRUCTION...

APPLICANT

AND

MBONGENI NGCAMPHALA.

FIRST RESPONDENT

LINDIWE NGCAMPHALALA.

SECOND RESPONDENT

CORAM

AGYEMANGJ

FDR THE APPLICANT:

C. MOTSA ESQ.

FDR THE FIRST AND SECOND

RESPONDENTS:

P. DLAMINI ESQ.

DATED THE 4th DAY OF SEPTEMBER 2009

JUDGMENT

In this application, the first respondent is praying for the following reliefs against the respondents: an order,

1. Staying the execution of the award under CMAC dispute number MB 372/2006;
2. Reviewing and/or setting aside the second respondent's award under CMAC dispute number 372/2006;
3. Ordering the respondents to pay costs in the event they oppose ;
4. Granting further and/or alternative relief as the court may deem appropriate. The matters of common cause are these:

The applicant is a company incorporated under the laws of Swaziland and the former employer of the first respondent. The first respondent obtained an award in his favour in connection with a dispute between himself and the applicant heard by the Conciliation Mediation and Arbitration Commission (CMAC). The second respondent is a Commissioner with CMAC who presided over the resolution of the said dispute. The first respondent as aforesaid was formerly employed by the first respondent as its Diesel Assistant. His employment took effect from August 1 2005 until 26/1/2006 when he was dismissed. Sometime in mid-December 2005, the first respondent as other employees of the first respondent proceeded on an end of year break. He resumed work on 11th January 2006. According to the first respondent, on that day, he saw that the plastic cover of the diesel bowser that he was in charge of, had been tampered with. Having discussed this with the driver of the diesel, he made a report to the first respondent's foreman on 17th January 2006. The reason for the delay he said was that it rained for days, and according to custom at the work place, he did no work due to the rain. Following the report regarding the alleged tampering with the diesel bowser, the applicant per its officers Justice Sibandze and Subisiso Nkambule investigated the report and found that the diesel flow meter had been tampered with as per a photograph tendered before second respondent marked W7. The first respondent and the driver one Sandile Vilakati were then invited for a disciplinary hearing. The notice of disciplinary hearing was served on the first respondent on 25/1/06.

The hearing was took place the next day 26/1/06. Following the disciplinary hearing, the first respondent, and the said driver were dismissed. The first respondent lodged an appeal in respect of the decision of the disciplinary panel. It was the case of the first respondent before the second respondent, that the hearing was chaired by one Conrad Meyer who also chaired the appeal hearing and in that second forum expressed his reluctance to change the earlier decision. The decision to dismiss the first respondent and his colleague thus remained unchanged. The first respondent reported a dispute between himself and the applicant to CMAC on June 9 2006. Citing his unfair dismissal, he made claims for notice pay, leave pay, and maximum compensation for unfair dismissal in terms of the Industrial Relations Act 2000. The dispute not having been resolved, the matter was referred to arbitration before the Commission. The issues for determination before the Commission were these: whether or not the first respondent was unfairly dismissed for tampering with the flow meter of the diesel bowser belonging to the applicant and further, whether the dismissal was procedurally fair.

The Commission chaired by the second respondent, found against the applicant and pronounced an award in favour of the first respondent, that the first respondent had been substantively and procedurally unfairly dismissed, and awarded him compensation.

It is against the said findings that the present application for review has been brought.

This application invokes the review jurisdiction of this court on common law grounds in accordance with S. 19 (5) of the *Industrial Relations Act 2000*. The said provision states: "*A decision or order of the court or Arbitrator shall at the request of any interested party be subject to review by the High Court on grounds permissible at common law*". The grounds on which the application has been brought are the following:

1. That the second respondent misdirected herself in holding that the applicant failed to rebut the evidence of the first respondent to show that the diesel flow meter was being used during absence of the first respondent.
2. That the second respondent misdirected herself in holding that the applicant failed to dispute the evidence that Sandile Vilakati had admitted to having broken the flow meter;
3. That the second respondent misdirected herself in holding that the first respondent had been dismissed for the unlawful conduct of his colleague;
4. That the second respondent misdirected herself in holding that the first respondent was absent from his duties and therefore could not be held responsible for other employees' actions;
5. That the second respondent misdirected herself in holding that the applicant failed to challenge the evidence led by the first respondent that the same official Mr. Conrad Meyer presided over both the disciplinary and the appeal hearings.

For ease of discussion, I shall condense the above-mentioned grounds into a single one, being a charge that the second respondent misdirected herself and in consequence, incorrectly made findings of fact and concluded that the first respondent was substantively and procedurally unfairly dismissed, although such findings were against the weight of evidence led.

In argument, learned counsel added a second ground (relying on some of the said matters set out as grounds): that the second respondent took into consideration irrelevant matters and ignored relevant considerations in arriving at the conclusion of substantive and procedural unfair dismissal.

With regard to the first ground set out, learned counsel for the applicant contended, expounding on the depositions contained in the founding affidavit, that the second respondent misdirected herself when she held that the diesel flow meter was used during the absence of the first respondent, averred that

this finding was in face of evidence led by the applicant herein that on 3 January 2006, the diesel bowser flow meter was functioning and furthermore, that on 11th January 2006 it was still functioning, a matter that enabled the first respondent to perform his duty of filling in daily diesel issues from that date until 17th January 2006. Learned counsel further cited the second respondent's finding that the applicant failed to rebut the evidence of the first respondent that the diesel flow meter was used during his absence as another case of misdirection. This matter he argued, had not been in issue and needed no finding. He contended that it was in fact common cause that the diesel flow meter was used during the festive season and in the absence of the first respondent and in any case, was borne out by the daily diesel issue dated 3rd January 2006 tendered by the applicant herein at that forum. The applicant also averred that the second respondent misdirected herself when she held that the applicant failed to challenge the evidence that Mr. Conrad Meyer presided over both the disciplinary hearing and the appeal hearing when Mr. Zweli Thwala stated clearly in his evidence not contained in the record, that it was Tommy Strydom who chaired the disciplinary hearing while Conrad Meyer chaired the appeal hearing.

Regarding the second respondent's consideration of irrelevant evidence in disregard of relevant ones, learned counsel contended that in her award, the second respondent took into account the irrelevant matter of the diesel bowser having been in use during the holidays, and ignored relevant consideration that at the time the first respondent and the driver reported to duty on 11th January 2006, the bowser was there and was removed by the driver.

Furthermore, he contended that the second respondent relied on the irrelevant matter of the driver's alleged admission that he had tampered with the glass of the flow meter, thus sidestepping the issue of who tampered with the flow meter itself (the matter regarding which no admission had been made), to find that that the first respondent was dismissed for the unlawful conduct of his

colleague. It is for these reasons that the applicant herein has invoked the review jurisdiction of this court on common law grounds. The application was strongly opposed by the respondents herein who contended *in limine*, that the grounds canvassed did not fall within the common law grounds the applicant had purportedly invoked. What are the common law grounds upon which the court may exercise its review jurisdiction? : Tebbutt JA in ***Takhona Dlamini v. President of the Industrial Court and Anor. Case No. 23/1997*** set out the common law grounds for review to include "... the fact that the decision in question was arrived at arbitrarily or capriciously or *mala fide*, or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose, or that the court misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter...", see also: per Innes CJ in ***Johannesburg Consolidated Investment Co. v. Johannesburg Town Council 1903 TS 111 at 114-116***; see also regarding the review by the South African Labour Court of the arbitrator's award: ***Joubert's Law of South Africa vol.13 First Reissue 2001 at 427 pp 887***.

The applicant has placed complaints before this court. But does he succeed in moving the hand of the court in exercise of its review jurisdiction?

As aforesaid, the first complaint put forward is that as a result of the second respondent's misdirection, she made erroneous findings of fact. These include the finding that the diesel bowser was in use in the absence of the first respondent who ordinarily had charge of it and got damaged in his absence. This finding was said to have been in face of evidence led that from 11th of January 2006 until 17th of January 2006, the first respondent was at post and did perform his duty of reading the flow meter until it was tampered with. Other findings the subject of the applicant's complaint include that the driver Sandile Vilakati's admission to the charge of tampering with the glass of the flow meter

which was not rebutted by the applicant, sufficiently answered the charge against the second respondent so that in effect the first respondent was dismissed for the unlawful act of his colleague, and furthermore, that the evidence of the first respondent that the same gentleman chaired both the disciplinary and appeal hearings was not challenged (thus standing as a fact). The applicant has complained that these were contrary to the evidence led before the second respondent. These included the following: evidence regarding the responsibility of the first respondent for the diesel bowser; the fact that diesel bowser which had been used during the holidays was used by the first respondent when he returned to work from 11th until the 17th of January 2006 when the tampering was reported; that a disciplinary hearing was held in which the driver admitted not to tampering with the diesel bowser (the charge against the second respondent at the disciplinary hearing), but the glass of the flow meter; that the disciplinary hearing correctly found that the first applicant had tampered with the diesel bowser and dismissed him therefor, and that his appeal had been properly dismissed.

It seems to me that the applicant's main complaint is that the second respondent arrived at the said findings (said to be erroneous) in face of the alleged weight of evidence to the contrary, through misdirection. A complaint of misdirection leading to erroneous or unsupportable findings is a complaint regarding an alleged error in the second respondent's evaluation of the evidence. Unless such misdirection amounts to a gross irregularity that may result in prejudice to the applicant, such a complaint ought not to be the subject of a review application which is concerned with the method of adjudication and not its result but of an appeal, see: Herbstein and Van Winsen's The Civil Practice of the Supreme Court of South Africa 932 (C) and (F

I have gone through the evidence led before the second respondent and I am satisfied that her findings find support from the evidence led. In consequence, I

find no misdirection. The application for review on the various charges of misdirection must therefore fail. Regarding the other complaint: that is, that the second respondent concerned herself with irrelevant considerations and disregarded relevant ones, it seems to me that the matters canvassed in argument being: the consideration of the matter of the diesel bowser having been in use during the holidays in face of the first respondent's case that when he returned to work on 11th January 2006 the flow meter had been tampered with, was not an irrelevant matter to be considered by the court. This was so especially as the applicant's witness confirmed that a number of people had access to it during that period. Whether that piece of evidence, in the light of the applicant's contention that the flow meter could not have been tampered with during the holidays as the first respondent had been able to work with it between 11th and 17th January should have held sway, is a challenge regarding the Tightness of the second respondent's finding that the flow meter got damaged in the absence of the first applicant so that he could not be held responsible for it.

Clearly, having regard to the evidence before her, the second respondent preferred the evidence of the first respondent that the flow meter was damaged in the holidays when the equipment was used by others and in the absence of the first respondent. Whether that was justifiable in face of all the evidence led is the matter in contention. The said piece of evidence cannot however, because there was allegedly contrary evidence, be said to have been irrelevant. When the court gave due consideration to it, it did not fail in its duty. Nor is it apparent that such consideration resulted in an unreasonable finding unfairly prejudicial to the applicant herein. Regarding the matter of the admission of guilt by the driver, it seems to me, upon a perusal of the record that the evidence led on behalf of the applicant before the second respondent, was that the matter of the tampering with the diesel flow meter related solely to the removal of/tampering with the glass cover.

I have not come across any part of the evidence led that suggested that there was other form of tampering (including a dealing with numbers), beyond the removal/tampering with the glass cover, the matter admitted by the driver Sandile Vilakati. Indeed the applicant's own witness Sibusiso Nkambule giving evidence before the second respondent had this to say: "That the time when it was reported that there was problem with the flow meter and then I went to check it. Then I found that it was removed the plastic glass - it was broken". He added during cross-examination that the prejudice the applicant herein stood to suffer with the breakage of the glass was that it would be easy to fiddle with the figures. He however acknowledged that he did not know if the numbers had been fiddled with.

For these reasons, I do not consider the arguments of learned counsel for the applicant meritorious for it seems to me going by Sibusiso Nkambule's evidence given on behalf of the applicant herein at that forum, that after the driver's admission of guilt for tampering with the glass of the flow meter, there was no other offence outstanding for which the first respondent was dismissed. The conclusion of the second respondent that the first respondent had been dismissed for the unlawful act of his colleague thus appears to be supportable from the evidence. In that circumstance, I find that the consideration and reliance on the admission of the said driver to arrive at the finding that the first respondent was dismissed for the unlawful act of the driver Sandile Vilakati could thus not be said to be a reliance on irrelevant evidence. I do not find that the first matters of misdirection complained about fall within the ambit of common law grounds for review.

With regard to the matter of the second respondent's alleged consideration of irrelevant evidence or the disregard of relevant evidence to make erroneous findings, I find that such did not obtain.

The applicant has not made out a credible case for review under common

law grounds. The arguments of learned counsel for the applicant are without merit. The applicant's case cannot stand and same must be dismissed.

Applicant's case is dismissed with costs.

MABEL AGYEMANG

HIGH COURT JUDGE