**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN**

Reportable

Case no: CA6/2016

In the matter between:

**SOUTH AFRICAN BREWERIES (PTY) LTD** **Appellant**

and

**HEINDRICH HANSEN** **First Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION** **Second Respondent**

**Hilary Mofsowitz N.O** **Third Respondent**

**Heard:** **28 February 2017**

**Delivered:** **25 May 2017**

**Summary: Dismissal for misconduct for making derogatory comments – employee dismissed for allegedly uttering "*Julle kaffirs is almal donnerse ewe onnosel*" to another employee – commissioner finding that employer failed to discharge the *onus* that these words were uttered by employee.**

**Held that where derogatory and racial language is used in the workplace, the employer bears the *onus* to prove that the language used by the employee was objectively derogatory. Employee disputing using such derogatory words - Matter resolves around the credibility finding on the credibility of the various factual witnesses; their reliability; and the probabilities – commissioner deferring his assessment on the credibility of witnesses to the internal chairperson's report and the disputed inter-depot registers - Evidence**

**demonstrating that had the commissioner assessed the credibility of the witnesses, he would have come to the conclusion that the employee victim of corroborated racial comments that *"Wie is jou kaffir?"* was in response to the employee uttering "*Julle kaffirs is almal donnerse ewe onnosel*"- commissioner failing to assess the credibility of each witness and arrived at an unreasonable award –Labour Court erring in upholding the award – Appeal upheld and employee's dismissal found to be substantively and procedurally fair.**

**Coram: Davis JA, Hlophe and Kathree-Setiloane AJJA**

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**JUDGMENT**

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KATHREE-SETILOANE AJA

[1] The appellant, South African Breweries ("SAB") appeals against the judgment of the Labour Court (Steenkamp J) in which he dismissed an application for the review and setting aside of an arbitration award made by the third respondent ("the Commissioner") under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in terms of which the Commissioner found the first respondent, Mr Hendrich Hansen's ("Hansen") dismissal by SAB to be substantively unfair and ordered his reinstatement. SAB dismissed Hansen for making the following racial remark to an employee of a contractor: "*Julle kaffirs is almal donnerse ewe onnosel.*"

Events leading up to Hansen's dismissal

[2] At the time of his dismissal, Hansen was the Regional Risk Manager at SAB's brewery in Newlands, Cape Town, having been employed by SAB since 2000. During the time of his dismissal, SAB had contracted with a logistics

company, D J Bosman Transport ("DJ Bosman"), to supply it with truck drivers to deliver its alcohol products to various parts of South Africa.

[3] On 16 June 2014, Mr Clarence Booysen ("Booysen"), an employee of DJ Bosman, was the driver of a truck code-named "BOS12" ("the truck") that had been loaded with SAB's alcohol products for delivery. As he drove the truck out of SAB's Newlands brewery, he was stopped by Hansen who had noticed that the load was not properly sealed. Booysen pulled the truck over and Hansen approached the driver's door and informed Booysen that the load on the truck was not sealed in accordance with SAB's delivery protocols. A verbal altercation between Hansen and Booysen ensued. The nature of their verbal exchange and whether it was witnessed by a third person is in dispute. On Booysen's version, Hansen shouted at him and exclaimed *"Julle kaffirs is almal donnerse ewe onnosel"*. In response to this, Booysen testified that he got out of the truck and asked Hansen *"Wie is jou kaffir?"*

[4] Mr Wendel Carolus ("Carolus") witnessed the exchange between Hansen and Booysen. Carolus testified that he had been resting inside the truck, driven by Booysen, when he was awoken by the verbal exchange between them. He said that he had been resting in the truck because he had driven it during the night shift from 18h00 on 15 June 2014 to 06h00 on 16 June 2014. He corroborated Booysen's version that Hansen had uttered the words *"Maar julle kaffirs is ewe onnosel"*. He furthermore confirmed that Booysen responded by asking Hansen *"Wie is jou kaffir?"*

[5] In addition, Booysen's Shift Supervisor, Mr Kurt Scullard ("Scullard") who testified in favour of SAB at the arbitration hearing, confirmed Carolus' presence in the truck a few minutes after the altercation between Hansen and Booysen. Scullard testified that Booysen had summoned him to the scene. When he arrived at the scene, he saw Carolus in the truck and asked him to drive the vehicle off-site. According to Scullard, the two drivers who were rostered to drive the vehicle on the morning in question were Booysen and Carolus.

[6] Hansen admitted that there was an altercation between him and Booysen but denied uttering the racially derogatory statement, referred to above. He also denied that Carolus was present on the scene to witness the altercation between Booysen and himself, and accused both Booysen and Carolus of fabricating the allegation against him. He also accused SAB's management of embarking on a "*witch-hunt to get rid of me*". Hansen alleged that Booysen had used "*indecent and foul language towards the dignity of [Hansen's] deceased mother*". Hansen placed great reliance on the inter-depot registers as reflecting that one Mr Mayatoza ("Mayatoza") was the person who drove the truck into the depot on the morning of the incident. He was, therefore, adamant that Carolus was not on the truck. He, however, conceded under cross-examination that he did not see Mayatoza driving the truck on the morning in issue.

[7] Following the events of 16 June 2014, SAB charged Hansen with gross misconduct for allegedly saying to Booysen that "*julle kaffirs is almal donners ewe onnosel*". On 21 August 2014, Hansen was found guilty in an internal disciplinary hearing and was dismissed. On 27 August 2014, Hansen requested an internal appeal against his dismissal. The dismissal was upheld on appeal.

The CCMA proceedings

[8] Dissatisfied with the outcome of the disciplinary enquiry and internal appeal process, Hansen referred an unfair dismissal dispute to the CCMA. The conciliation failed, and the dispute was referred to arbitration before the Commissioner. The substantive and procedural fairness of Hansen's dismissal was placed in dispute in the arbitration. The Commissioner found Hansen's dismissal to have been procedurally fair but substantively unfair and ordered his retrospective reinstatement. In arriving at her decision, the Commissioner reasoned as follows:

> 'Booysen testified that [Hansen] made a racially derogatory comment towards him. The presiding officer of the internal appeal process did not regard

Booysen as a confident witness and concluded that on Booysen's evidence alone, he would have given [Hansen] the benefit of the doubt. The presiding officer concluded that Booysen was clearly "violating sealing protocol", was "fearful of losing his job" and "could have been motivated to fabricate his version. I have also found Booysen's version of events to be lacking in credibility given that he failed to use the opportunity to inform his controller when he had the opportunity to do, failed to inform his employer and informed the respondent's shop steward a few days later. From the shop steward's reaction, it will appear that Booysen only mentioned having been banned from the site as opposed to having been humiliated or sworn at.

[SAB] relied heavily on the evidence of the second driver who confirmed that he witnessed the alleged incident. While Carolus substantiated the evidence of Booysen, the evidence does not support the conclusion that Carolus was on the vehicle at the time. Carolus testified that he had worked the previous night shift and remained on the vehicle after that. The respondent's documentation (the record of vehicles entering and leaving the premises) does not corroborate the version of Carolus in any way. The record (completed by the security officials stationed at the access point of [SAB's] premises) does not reflect the version of Carolus. The vehicle returns to site approximately at three in the afternoon with Booysen as the driver and leaves [SAB's] premises sometime later with Carolus as the driver and returns to site a few more times (that evening) with Carolus as the driver. These contradictions were not answered. [SAB] did not give any reasonable explanation. While I can accept that a security official could make an error, it could not be to the extent as reflected on the documentation. I therefore find that the version of Carolus was not credible and have concluded that Carolus may have not been on the vehicle when the incident occurred. It is highly unlikely that had Carolus heard such an altercation and heard words which were clearly derogatory in nature that he would have remained in the vehicle lying on a seat without at least sitting up. I have accepted the evidence of Hansen that he did not see Carolus in the vehicle and therefore the evidence of Scullard does not assist [SAB's] case. The appeal presiding officer disregarded the evidence of Scullard on two counts; that Scullard was not a witness to the incident and that Scullard was used as an interpreter in the initial hearing and testified after hearing the evidence of the other two

> witnesses. In any event, it was not disputed that [Hansen] had instructed Scullard to find an alternative driver to take the vehicle off [SAB's] premises. The contract between [SAB] and DJ Bosman requires a second driver on all vehicles. The departure from this requirement may well have contributed to the version that there was a second driver on the vehicle when there was not. Reference was also made to the different versions of Carolus and Booysen as to what transpired at the time of the incident and the different versions of Carolus at the initial hearing, the appeal hearing and at arbitration and this further serves to weaken the evidence of Carolus.'

The Commissioner accordingly found that SAB could not discharge its *onus* of proving that Hansen's dismissal was substantively fair as the versions of the parties were "equally probable".

The Review Proceedings

[9] On 15 April 2015, the appellant launched proceedings in the Labour Court to review and set aside the arbitration award. On 2 February 2016, the Labour Court dismissed SAB's review application on the basis that:

> '[V]iewed holistically against the evidence led at the arbitration, the [A]ward is not so unreasonable that no other arbitrator could have come to the same conclusion.'

In arriving at this conclusion, the Labour Court reasoned as follows:

> 'Could the arbitrator have reached the conclusion that she did on the evidence before her? I think so. She considered the evidence and weighed up the probabilities. On review, as opposed to appeal, her conclusion was one that another arbitrator acting reasonably could also have reached.
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> It is so that the arbitrator referred to the appeal chairperson's finding with regard to Booysen's credibility. But the award and the evidence of the arbitration must be regarded holistically. She formed her own view of the probabilities on the evidence before her. And she also found Booysen not to be a credible witness, but for reasons other than those mentioned by the

appeal chairperson. That is not a finding that a court on review is likely to interfere with.

As to Scullard's testimony, although the appeal chairperson disregarded it, the arbitrator did not have regard to it in the arbitration, which is a hearing de novo. She considered Hansen's undisputed evidence that he had instructed Scullard to find an alternative driver to take the truck off the premises. It is common cause that Scullard was not a witness to the incident. And she pointed out that Scullard testified that Hanson complained that Booysen had sworn him; yet Booysen made no mention off Hansen's alleged racist insult. The oblique reference to the appeal chairperson's findings does not make the result off the arbitration award unreasonable in the light of the evidence led at the arbitration.

Turning to the security registers, the arbitrator quite reasonably considered the discrepancies between the evidence of Carolus and the vehicle movements recorded on the register. Her conclusion in this regard may be right or wrong; but it is not so unreasonable that no other arbitrator could have come to the same conclusion.

Considering the question whether Hanson uttered the racist words, the arbitrator considered the credibility of the witnesses before her; the probabilities; and came to a conclusion on the balance of probabilities. She asked the right question and came to a reasonable conclusion. That conclusion is not open to review, as opposed to appeal. It is so that Carolus essentially corroborated Booysen; but the arbitrator clearly and reasonably explains why she preferred the evidence of Hanson. That is exactly what an arbitrator should do. The test is not whether this Court may have come to a different conclusion; it is whether the conclusion reached by this arbitrator is so unreasonable that no arbitrator could have reached it. I think not.'

It is against this finding that SAB appeals, with leave of the Labour Court.

The Review Test

[10] The test that the Labour Court is required to apply in a review of an arbitrator's award was settled by the Constitutional Court in *Sidumo and*

*Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*[1] It is that an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach. Essentially, this test requires the Labour Court, sitting as a court of review, to enquire whether the decision under review is one that a reasonable decision-maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required in reviews, provided that the result is one that a reasonable decision-maker could have reached. This was clarified by the Supreme Court of Appeal in *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae)*[2] as follows:

> 'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii) …the Arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable Arbitrator could not reach on all the material that was before the Arbitrator. Material errors of fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[3]

[11] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (Gold Fields),*[4] this Court refined the *Sidumo* test by introducing *a* two-stage enquiry. In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome by demonstrating that the outcome

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[1] [2007] 12 BLLR 1907 (CC) at para 10.
[2] *Andre Herholdt v Nedbank Limited, (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).
[3] At para 25.
[4] [2014] 1 BLLR 20 (LAC).

would have been different having regard to the evidence before the arbitrator. An arbitration award will, therefore, be considered to be reasonable when there is a material connection between the evidence and the result.

[12] The basis of the appeal, as contended for on behalf of SAB, is that the Labour Court's failure to apply the two-stage enquiry resulted in it concluding, erroneously, that the Commissioner's decision that Hansen's dismissal was substantively unfair, was one that a reasonable decision-maker could not have reached. It argued that had the Labour Court properly applied the two-stage enquiry, as postulated in *Gold Fields,* it would have concluded that the award was unreasonable as it was entirely unsupported by the evidence.

Evaluation

[13] Although Hansen had expressly denied using the impugned words at the arbitration hearing, he did not dispute that dismissal for such misconduct would be an appropriate sanction. Notably, in this regard, our courts have taken a very firm stand on the use of racist language in the workplace, in particular, the use of the word "kaffir", visiting upon such misconduct the sanction of dismissal.[5] More recently, the Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[6] said this in relation to the history, meaning and implications of the use of the word "kaffir":

> '[T]he word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.'

[5] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* [2002] 6 BLLR 493 (LAC) at para 35; *City of Cape Town v Freddie and Others* [2016] 6 BLLR 568 (LAC).
[6] (2017) 38 ILJ 97 (CC) at para 4.

The Constitutional Court went on to quote the words of Brook J in *Thembani v Swanepoel*,[7] which it said captured the best rendition of the use of the word kaffir as being "undoubtedly disparaging, hurtful and intentionally hateful":[8]

> 'The term "kaffir" historically bandied about with impunity, is a term which today cannot be heard without flinching at the obvious derogatory and abusive connotations associated with the term. It is rightly to be classified as an inescapable racial slur which is disparaging, derogatory and contemptuous of the person of whom it is used or to whom it is directed. Considered objectively, the use can only be an expression of racism with a clear intention to be harmful and to promote hatred towards the person of whom it is used or to whom it is directed. This brings its use clearly within the ambit of section 10 of [the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000].' [9]

[14] In relation to the seriousness of the misconduct of using the word "kaffir" in the workplace, the Constitutional Court[10] quoted the words of Zondo JP in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others,* where he said this:

> 'The attitude of those who refer to, or call, African's 'kaffirs' is an attitude that should have no place in any workplace in the country and should be rejected with absolute contempt by all those in the country – black and white – who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard, the courts must play their proper role and play it with the conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will 'give expression to the legitimate feelings of outrage' and revulsion that reasonable members of our society – black and white – should have when acts of racism are perpetuated.' [11]

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[7] 2017 (3) SA 70 (ECM) .
[8] *South African Revenue Service v CCMA* at para 5.
[9] At para 13.
[10] *South African Revenue Service v CCMA* at para 54.
[11] At para 37.

[15] SAB bore the *onus* to prove in the arbitration that Hansen uttered the words "*Maar julle kaffers is ewe onnosel"* when addressing Booysen in the workplace on the day in question, and that the words were objectively derogatory and racist in context. In the ordinary course, where derogatory and racial language is used in the workplace, the employer bears the *onus* to prove that the language used by the employee was objectively derogatory.[12] However, where the word "kaffir" is used, as is the case here, its derogatory connotation is so blatant as to be taken as established. It bears repetition, in this regard, that being called "a kaffir" is one of the "worst insults" in the South African context.[13] However, the employer will still bear the *onus* to prove that the employee uttered the derogatory word/s.

[16] Accordingly, in the present case, SAB bore the *onus* to prove in the arbitration that Hansen had uttered the derogatory words when addressing Booysen in the workplace. There are, however, two irreconcilable versions on the evidence in relation to this question. In resolving the dispute of fact, the Commissioner was, accordingly, required to make findings on the credibility of the various factual witnesses; their reliability; and the probabilities.[14] The Commissioner was, as such, obliged to assess the credibility of each of the witnesses who testified at the arbitration, and in doing so, was required to consider the prospects of any partiality, prejudice or self-interest on their part and the weight to be attached to their testimony by reason of its inherent probability or improbability.[15] At the very least, in relation to the witnesses who testified in favour of SAB, the Commissioner ought to have considered (i) their candour and demeanour; (ii) their bias, latent and blatant compared to that of Hansen; (iii) internal and external contradictions in their evidence; (iv) the probability or improbability of particular aspects of their versions; and (v) the calibre and cogency of their performance compared to that of Hansen. It is,

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[12] *SAEWU v Rustenburg Platinum Mines* LAC Case No: JA 45/2016, 3 May 2017 (handed down on 3 May 2017).
[13] *South African Revenue Service v CCMA* para 53.
[14] *SFW Group Ltd and Another v Martell ET Cie and Others* 2003 (1) SA 11 (SCA) at para 5.
[15] *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others* (2011) 32 ILJ 723 (LC) at para 9.

however, clear from her award, that the Commissioner failed to consider any of these things.

[17] In arriving at the conclusion that Booysen's evidence was *"not entirely credible"*, the Commissioner relied on two things; the first was the view of the internal appeal chairperson who did not regard Booysen as a credible witness, and the second was the fact that Booysen had failed to report the derogatory nature of Hansen's statement timeously to his superiors. The Commissioner clearly abdicated her responsibility to independently scrutinise Booysen's testimony and determine whether the conclusion reached by the internal chairperson on Booysen's credibility was sustainable. Her inclination to defer to the findings of the internal chairperson is again apparent from her reasons for rejecting Scullard's testimony, on the disputed issue of Carolus' presence in the truck at the time of the altercation between Hansen and Booysen. As opposed to assessing the probability or improbability of each party's version on this disputed issue, she accepted Hansen's version and rejected both Scullard's and Booysen's by deferring to the decision of the internal appeal chairperson.

[18] Had the Commissioner applied her mind independently to the evidence presented by Scullard, she would have appreciated that Scullard testified that when he arrived at the scene, he told Hansen, after Hansen had enquired who would drive the vehicle, that there was a secondary driver that was also on the vehicle, namely Carolus. The latter part of Scullard's conversation with Hansen was seemingly ignored by the Commissioner. Scullard testified that when he arrived at the scene a few minutes after the altercation between Hansen and Booysen, he saw Carolus in the truck and asked him to take the vehicle out to the client. During cross-examination, Scullard was shown the inter-depot registers and he explained that regardless of what they recorded, the two drivers who were rostered to drive the vehicle on the morning in question, were Carolus and Booysen, and that when he got to the vehicle he had seen that Carolus was inside the vehicle. He reiterated that he had instructed Carolus to take the truck off site after the altercation, which Carolus

then did. In the circumstances, the Labour Court ought to have found that the Arbitrator's failure to independently consider both Booysen's and Scullard's evidence was not reasonable.

[19] In addition, the Commissioner failed to consider the undisputed evidence, as well as the probability or improbability of both Booysen's and Carolus' versions vis à vis that of Hansen on the disputed issue of whether he uttered the racially derogatory statement. Crucially, on this score, she attached no significance to Booysen's testimony that he had responded to Hansen's racially derogatory statement with the question *"Wie is jou stupid kaffirs?"* Carolus testified that he had heard Booysen asking this question as he was resting in the truck when the exchange between Hansen and Booysen took place. As indicated, Carolus' presence in the truck was confirmed by the testimony of Scullard, who was called to the truck shortly after the incident. In fact, as the exchange between the Commissioner and Hansen quoted below demonstrates, Hansen, in essence, admitted that Booysen had asked him *"[w]ho is your stupid blacks?":*

> 'COMMISSIONER: OK, can I just pause a moment? What is your version that Mr Booysen replied to you?
>
> MR HANSEN: He asked me, he didn't mention the word "kaffir" at all.
> COMMISSIONER: What did he say?
> MR HANSEN: "Who is your stupid blacks?"
> COMMISSIONER: You are saying to this witness that Mr Booysen said: "Who is your stupid blacks?"
> MR HANSEN: That's correct.'

[20] Notably, this exchange between the Commissioner and Hansen took place during his cross-examination of Carolus, when the Commissioner sought to clarify Hansen's version concerning Booysen's question to him: 'Wie is jou kaffir?' Significantly, during his evidence in chief, Hansen did not mention that during the altercation, Booysen had, in fact, asked him *"who is your stupid blacks?"*. The thrust of Hansen's evidence-in-chief was to point out that there were no allegations of racism made against him until much later. In this

regard, Hansen alleged that Booysen had used “indecent and foul language towards the dignity of [Hansen’s] deceased mother”.

[21] However, it is clear from Hansen’s version, as illustrated in his exchange with the Commissioner (referred to above), that the issue of race came up during the altercation. In light of Hansen’s admission that Booysen had asked Hansen “who is your stupid black”, coupled with Booysen’s version to this effect (which was corroborated by Carolus), the Arbitrator ought to have considered and concluded that Booysen would not have randomly asked, “who is your stupid blacks”. On the probabilities, there would have been no reason for Booysen to make such a statement, other than in response to Hansen’s racially pejorative utterance: “Maar julle kaffers is ewe onnosel”. The Commissioner’s failure to consider this material common cause fact resulted in her concomitant failure to consider the probability of both Booysen’s and Carolus’ versions that Hansen had uttered the racially derogatory statement. The Labour Court ought to have found that this omission constituted an irregularity which rendered the Award unreasonable, but it failed to do so.

[22] Furthermore, in assessing the credibility of the witnesses who testified in favour of SAB, the Commissioner failed to consider that the complainants were not employees of SAB and would have had to conspire with each other to lie. While the Commissioner was content on relying on the internal appeal chairperson’s finding that Booysen “was fearful of losing his job” and considered this sufficient to find his credibility wanting, she failed to consider Hansen’s latent or blatant bias in presenting the version that he did at the arbitration. Had she considered this, the Commissioner would have concluded that the likelihood of Booysen and Carolus misleading her on the events was less probable than Hansen doing so.

[23] In impugning Booysen’s credibility on the basis that he feared losing his job, the Commissioner failed to have regard to two important facts. The first was that it was common cause that the sealing of the truck was the responsibility of the security guards and not the drivers of the vehicles, and the second was

that, despite Hansen's allegation that Booysen had used racist language, Booysen returned to work immediately after the altercation and remained employed. There were, accordingly, no indications on the evidence before the Commissioner of any adverse consequences for Booysen in relation to his further employment with D J Bosman Transport.

[24] Unlike Booysen and Carolus who were not employed by SAB, Hansen was dismissed for his alleged misconduct and had not secured alternate employment since his dismissal. A failure to vindicate himself at the arbitration hearing would, therefore, have had significant personal consequences for him. The Commissioner failed to appreciate this factor when assessing Hansen's credibility. The Labour Court, in my view, ought to have been circumspect in assessing the reasonableness of the Award in light of the Commissioner's omission in this regard.

[25] In finding that SAB had not discharged its evidentiary burden, the Commissioner found that it had relied heavily on the evidence of Carolus to corroborate the testimony of its primary witness, Booysen. Without making proper credibility assessments of either Booysen or Carolus, she found that the documentary evidence presented by Hansen did not support Carolus' version. In so doing, the Commissioner placed an unreasonable and arbitrary reliance on the inter-depot register which was shown to be inaccurate on the unchallenged evidence of Booysen, Carolus and Scullard. The admission of the inter-depot registers self-evidently did not mean that what was recorded was true.[16] Significantly, in this regard, Booysen confirmed in cross-examination that the register did not record whether a second driver was in the vehicle. He testified that the register was completed by a security guard and he had no input on the document. Carolus, likewise, testified that the security guards knew that he and Booysen were assigned to the same truck and would, therefore, write either driver's name when they saw "BOS128", regardless of who was driving. It was put to Carolus that the register recorded

[16] *Weintrauab v Oxford Brick Works (Pty) Ltd* [1948] 1 SA 1090 (T), Zeffertt, Paizes and Skeen *The South African Law of Evidence* (Lexisnexis Butterworths 2003) at 686.

that one Mayatoza drove "BOS128" into the Newlands site on 16 June 2014 at 07:06 thus implying that Carolus was not on the truck on the day in question. Carolus disputed this.

[26] However, despite the challenge to the veracity of the documentary evidence relied upon by Hansen, he failed to call the author of the register to testify at the arbitration hearing in confirmation of the contents of the register. It is a trite principle of the law of evidence that where a document sought to be introduced as evidential material from which conclusions are ultimately sought to be drawn, the author of the document, or a person who can demonstrably be shown to have associated himself or herself with the document ought to be called as a witness.[17]

[27] Had the Commissioner properly assessed the documentary evidence in light of the direct evidence of both Carolus and Booysen, she would not have placed an unreasonable and arbitrary reliance on the inter-depot register. Her factual conclusions were manifestly arbitrary and not supported by the evidence as a whole. In light of this, the Labour Court ought to have found that the Commissioner's finding on this aspect was not reasonable.

[28] To sum up, there were a number of gross irregularities in the proceedings, which included the Commissioner's: (a) failure to evaluate significant common cause facts; (b) arbitrary and unreasonable rejection of corroboratory evidence tendered on behalf of SAB; (c) disregard of Hansen's latent or blatant bias; and (d) unreasonable and arbitrary reliance on documentary evidence which was shown on the unchallenged evidence to be inaccurate and unconfirmed. But for these irregularities, the Commissioner would have arrived at a different conclusion. The Labour Court's approach to the review, in my view, was to unduly defer to the findings of the Commissioner as opposed to considering whether there were irregularities in the proceedings, and if so whether they were material to the outcome. Thus, had the Labour

[17] Zeffertt, Paizes and Skeen *The South African Law of Evidence* (Lexisnexis Butterworths 2003) at p 694.

Court followed the two-stage approach to the review, as articulated by this Court in *Gold Fields*, it would have concluded that the irregularities committed by the Commissioner were material to the outcome, and that having regard to the evidence before her, her decision was not one which a reasonable decision- maker would have arrived it. Simply put, the Labour Court ought to have found that the award was unreasonable as it was entirely unsupported by the evidence.

[29] I accordingly consider the Labour Court to have erred in not reviewing and setting aside the award of the Commissioner. In the result, the finding of the Commissioner that the dismissal of Hansen was substantively unfair must be set aside. I see no reason in law or fairness why costs should not follow the result.

[30] For these reasons, the appeal succeeds and it is ordered that:

1 the appeal is upheld with costs;

2 the order of the Court *a quo* is set aside and replaced with the following order:

*'The arbitration award of the third respondent dated 3 March 2015 under the auspices of the Commission for Conciliation, Mediation and Arbitration under case number WECT 15074-14 is set aside, the first respondent's dismissal having been procedurally and substantively fair.'*

F Kathree-Setiloane AJA

Davis JA and Hlophe AJA concur in the judgment of Kathree-Setiloane AJA

APPEARANCES:

| | |
|---|---|
| FOR THE APPELLANT | F Boda SC<br><br>Instructed by Norton Rose Fulbright South Africa Inc |
| FOR THE FIRST RESPONDENT: | N Greef: Solidarity |