IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No: JR 1568/02

In the matter between

MOLOKO SALPHINA	Applicant
and	
Commissioner NTSOANE DIALE	1st Respondent
CCMA	2nd Respondent
HYPERAMA (MAYVILLE)	3rd Respondent

JUDGMENT

TOKOTA AJ:

[1] The applicant was employed by the third respondent since 26 January 1981 until she was dismissed on 21 February 2002.

[2] The events leading to the dismissal can be summarized as follows:

Whilst on duty on 16 February 2002 she was called to the office of the Administrative Manager of the third respondent one Mr. Botha. In that office she was confronted with an allegation that she had "bumped" a customer at the fruit and vegetable section. This bumping was interpreted as an assault on the customer. The applicant immediately denied that she had "bumped" or assaulted anybody. She was then served with a suspension letter and was ordered to leave the store immediately. She was then told to come to the disciplinary hearing on 20 February 2002.

At the disciplinary enquiry Mr. Botha represented the employer Mr. De Beer one of the Sales Manager of the employer presided. An interpreter for the applicant was used. Applicant was not represented. The only evidence that was led in support of the charges was an unsworn statement of the alleged complainant one Ms E Van Zyl and a video footage. Despite the denial of the incident by the applicant Ms Van Zyl was not called as a witness. The reason advanced for

failure to call Van Zyl was because " she gave a statement" and a videocassette was used. I will revert to this later.
The applicant was then found guilty and dismissed.

[3] As the applicant was not satisfied with dismissal she declared a dispute of unfair dismissal, which culminated in the arbitration. The arbitrator found that although there was a fair reason to discipline the applicant and a fair procedure followed, the sanction was too harsh and an order of re-employment was made.

[4] The applicant brought this review application seeking an order setting aside the arbitration award and substituting the same with an order which the court deems fit. The review is based on a number of grounds. The main ground, which was pressed in argument by Mr Khoza who represented the applicant was that, the arbitrator committed a gross irregularity in relying on a statement by Ms Van Zyl, who was never called as a witness either at the disciplinary enquiry or at the arbitration. Furthermore, so the argument ran, the video footage was of such a poor quality that no clear vision of an assault could be seen on it.

[5] The employer opposed the applicant and brought a counter-application reviewing and setting aside the arbitration award to the extent that an order for re-employment was made. The grounds of review include that the commissioner exceeded his powers by interfering with the sanction imposed by the employer. The fate of this counter –application must depend on the main application. Consequently I deem it expedient to first deal with the main application.

[6] In my view the applicant was dealt a severe blow where no reliable admissible evidence was led to support the allegations against her. Firstly when she was confronted with the allegations on 16 February 2002 she asked where the customer was and was told that there was nothing to discuss with her. She should go and ask these questions at the disciplinary hearing. When the alleged customer made a complaint she did not know the applicant. Mr. Botha stated that they looked for the applicant in the store and she was pointed out to him at a distance as he was investigating the complaint. The statement that was relied upon both at the disciplinary hearing and at the arbitration was clearly unreliable as hearsay. It was an unsworn complaint. There was no authentication of the video footage, which was clearly a copy. I am mindful of the fact that disciplinary enquiries do not have to imitate courts of law by applying strict rules of evidence. However, it is incumbent upon the employer to establish at least a valid reason for the dismissal of its employee.

[7] I have not been able to find an authority for the admissibility of video and audio recordings both in disciplinary enquiry and arbitration proceedings and I was not referred to any. In my view where, as this case, the applicant denies the picture in the video recording, for the admissibility thereof, it must be established that:

i) the recording device was capable of taking the testimony.

ii) there were no changes, additions or deletions that have been made to the recording.
iii) on the evidence as a whole there exists no reasonable possibility of interference.
iv) the tape recordings relate to the occasion to which they allegedly relate and no other.

[8] Wide use of video films in entertainment industry has resulted in the techniques of illusion and deception being brought to powerful perfection. For this reason any such video recordings used in any tribunal should be authenticated if reliance is to be placed upon them.

[9] As indicated above there is a dearth of authority in the civil context regarding admissibility of video recordings. In **S v RAMGOBIN and OTHERS 1986(4) SA 117 (N) at 125 G – I,** it was stated that it is not objectionable to ask a witness whether he recognizes a scene or a person in a photograph, even if he did not take the photograph, or was not present when it was taken, or even if the origin of the photograph is unknown, but if the witness says he does not recognize any person or scene in the photograph, it will not be admissible in the absence of proof that it is what it purports to be. The case of **S v W 1975 (3) SA 841 (7) ( ) at 842H** establishes that photographs and films must be identified as true representations of the objects and persons, which they purport to represent before they can be said to be real evidence. Objects do not prove themselves anymore than documents do."

[10] The videocassette was brought to court and I had an opportunity to observe it. The recordings are so poor that I could not recognize any assault on any person. I have watched the videocassette in different video machines for several occasions. Despite this I could not be able to identify any person being assaulted.

[11] Regard being had to inherent dangers of accepting, without further ado, evidence of this nature I am of the view that the arbitrator committed a gross irregularity in relying thereon. The arbitrator found that "the applicant conceded under cross examination that she was the person in white clothes on the video footage. However, she denied bumping the customer." This finding is factually incorrect. The record reveals the following:
"Q; Have you ever denied that it was you on that video when the respondent's witnesses testified and when you testified?
A: I don't understand.
Q: What don't you understand?
A: What you want to ask.
Q: When the witness testified you never disputed that it was you on the footage.
A: What I dispute is that the person on the video is me."

In view of his findings the arbitrator obviously ignored this evidence

thus he committed misconduct in relation to his duties by disregarding the evidence placed before him. In my view in the absence of any authentication of this video recording and

identification by Ms Van Zyl this evidence should have been excluded.

[12] With regard to the so-called statement of Ms Van Zyl there was no basis in law why the arbitrator admitted this hearsay evidence. There was no explanation as to why Ms Van Zyl was not called as a witness. In that statement she left a Cell phone number where she could be contacted. There was no evidence that any attempt was ever made to secure her attendance. On 16 February 2002, the date of the incident, there is no satisfactory explanation why she had to secretly point out the applicant to Mr. Botha. Furthermore, this evidence did not fall within the ambit of exceptions against the admission of hearsay evidence as envisaged in section 3 of the Law of Evidence Amendment Act No. 45 of 1988.Why applicant was not afforded an opportunity to admit or deny in her presence any assault is a mystery. This statement ought to have been excluded as well.

[13] As to procedure, which was followed, I make the following observations: The employer called the applicant on 16 February 2002 and confronted her with the allegations, which were "immediately denied." A decision was taken to suspend her with immediate effect. She was not afforded any hearing before that decision was taken. She was given only four days, including the date of hearing, to prepare for the hearing. This deprived her sufficient opportunity to consult for proper advice. In my view there was no proper procedure followed, as the time was too short to reflect.

[14] In judging fairness the court must ultimately apply a moral or value judgment regard being had to the established facts and circumstances of the case under consideration.
SEE: BOARDMAN BROTHERS (NATAL) v CHEMICAL WORKERS INDUSTRIAL UNION 1998 (3) SA 53 (SCA) 58B

FOOD & ALLIED WORKERS UNION & OTHERS v CHAPELAT INDUSTRIES (1989) 10 ILJ 552 (IC)

It is a rule of natural justice that a party should be afforded an opportunity to present its case and to present evidence in support thereof or to contradict or challenge evidence, which is against him. Such evidence includes films video and tape recordings. **SEE: Baxter Administrative Law p 553.**
The Appellate Division in **Zuma v Jockey Club of South Africa 1974 (3) SA 633 (A)** it was stated as follows at 646 F&H; "The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the chemical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him (**Marlin's case, Supra at p. 126; Becker v Western province sports Club(2nc); 1972 (3) SA. 8 3 (C)**

at.p.811)
The tribunal is required to listen fairly to both sides and to observe "the principles of fair play" **(Marlin's case supra at p 126 and 128).** In addition to what may be observed as the procedural requirements, the fundamental principles of justice require a domestic tribunal to exchange his duties honestly and impartially (**Dabner v SA Railway & Habours, 1920 AD 583 at 589).** They require also that the tribunal's finding of the facts on its decision is to be based shall be 'fair and bona fide' (**Jockey Club of SA v Transvaal Racing Club supra at p.450)."**

[15] It is needless to say that if the arbitrator's findings in respect of the allegations of fact involved were based on the evidence before him which he could reasonably and honestly arrive at a conclusion at which he did this court cannot interfere. In this regard it is sufficient to refer to the decision of **Gliksman v. Transvaal Provincial Institute of the Institute of SA Architects and Another 1951(4) SA 56 (W)** where Murray J expressed himself as follows at 62D *"(t)he matter, however, assumes a different complexion if there is shown to be entire absence of any evidence on which a reasonable man, or a body of reasonable men, could have based such finding. In such a case the position is as stated by DE VILLIERS CJ in Mpemvu and Others v Nqasala 26 SC 531 at 533, such statement being quoted with approval by WATERMEYER CJ in R v Kalogeropoulos 1945 AD 38 at 51:*

'Where the lower court had some evidence before it to justify its verdict this Court will not disturb that verdict even although it should consider that its own verdict would have been different. But what is this Court to do if there is no evidence whatever to justify the finding? It appears to me that it is an irregularity which the Court is bound to correct. Among the grounds of review are gross irregularity of proceedings, the admission of illegal evidence and the rejection of legal evidence. To give judgment against a man without any evidence whatever against him seems to be a greater irregularity than to reject legal evidence or admit illegal evidence, for it ignores the very object for which all the rules of evidence exist.'"

[16] It follows in my Judgment that the exclusion of the video evidence and statement of Van Zyl leaves the employer with no evidence to prove any assault on any customer. In my view, therefore, the award cannot stand and falls to be set aside.

In the result I make the following order:

1. The award made by the first respondent dated 19 August 2002 is reviewed and set aside.
2. The dismissal of the applicant was both substantially and procedurally unfair.
3. The applicant is to be re-instated from the date of her suspension on conditions not less favourable than those that she enjoyed before her unfair dismissal.
4. The counter application is dismissed
5. No order as to costs is made.

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TOKOTA AJ

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 26 March 2004

Date of Judgment: 20 April 2004

For the applicant: Mr. Khoza Union Official

For the respondent: Attorney Ms Lindstrom