IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR 1067/03
REPORTABLE

In the matter between:

SCOPEFUL 21 (PTY) LTD T/A
MALUTI BUS SERVICES APPLICANT

And

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS' UNION OBO MJ MOSIA 1st RESPONDENT

SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL 2nd RESPONDENT

ARBITRATOR MAHUBE MOLEMELA 3rd RESPONDENT

REASONS FOR JUDGMENT

REVELAS,J

[1] The applicant seeks to review an award made by the third respondent ("the arbitrator") in favour of Mr MJ Mosia (Mr Mosia), its former employee. In the award dated 22 May 2003, the arbitrator concluded that Mr Mosia's dismissal by the applicant was substantially unfair and ordered his retrospective reinstatement.

[2] The attack on the arbitrator's award was bifurcated. Firstly, it was argued that the reinstatement order made by the arbitrator was outside and exceeded her terms of reference. Secondly, it was argued that the

conclusions reached in the award was not rationally connected to the evidence before the arbitrator, in that she did not apply her mind to the evidence before her.

[3] Terms of reference :

In the arbitration agreement, the terms of reference stipulated that the arbitrator should make a finding as to whether the dismissal of Mr Mosia was procedurally and substantially fair or unfair.

[4] The applicant argued that since the terms of reference in the arbitration agreement was silent concerning any further orders that the third respondent may issue (in other words any relief), the arbitrator exceeded her terms of reference by reinstating Mr Mosia. It was submitted by the applicant that there was "no doubt that the third respondent both understood and was aware of his (sic) limited terms of reference". Strong reliance was also placed on the fact that the arbitrator, subsequent to this application being served on her, had filed an affidavit stating that she had made an error by reinstating Mr Mosia, adhering to a view that her terms of reference did not empower her to grant reinstatement.

[5] At this juncture I must point out that the arbitrator's statement or admission that she had erred, is no more than her opinion which is not binding or persuasive as she was not a party to the arbitration agreement or terms of reference.

[6] To determine the merits of this ground of appeal, I have to consider what the intention of the parties were. On the probabilities it is highly unlikely that two parties would agree to have the fairness of a dismissal arbitrated by an arbitrator and purposely exclude any relief in the event of a finding of substantive and or procedural fairness. That would make no sense.

[7] If one would however conceive of such an improbable agreement, then the probabilities would dictate that when the employee party (the first respondent's representative) indicated that the relief he persued on behalf of Mr Mosia was reinstatement (as did occur in this case) there would be an objection on record. There was none. And this was so because there could not possibly be such an agreement.

[8] Furthermore, if parties for some particular reason wished to enter into such an ostensibly absurd agreement they would most certainly have recorded it in no uncertain terms, owing to the fact that it is so exceptional.

[9] The aforesaid reasoning does not amount to writing a contract for the parties as the applicant has argued. It is based on a simple understanding of labour relations and the phenomena that employers and employees have their disputes arbitrated to have it resolved with a meaningful outcome, whether a statute regulates the referral of such a dispute or the parties themselves resort to private arbitration, as was the case with this arbitration and so many other instances.

[10] The arbitrator was thus empowered to determine the appropriate relied to be awarded in the event of finding the dismissal to be unfair. The arbitration agreement should be read to reflect that the common intention which the parties had, namely to obtain relief commensurate with the finding as to fairness. One could hardly imagine that an employee who refers a dispute about an unfair dismissal would do so without any relief attached to a finding in keeping with the dispute he or she has referred.

[11] <u>The Merits:</u>

It was argued by the applicant that the arbitrator did not apply her mind to the facts before her. The facts were that Mr Mosia was dismissed for failing to stop for an inspection. Mr Motaung (the inspector) gave evidence that he was standing at a bus stop and waved with his board to stop the bus driven by Mr Mosia, who did not heed to his signal. It is stated that Mr Mosia stopped thirty five metres away from the bus stop, to permit a passenger to alight and then drove off. Due to this, Mr Motaung did not have the opportunity to reach the bus.

[12] Mr Mosia's version was that he stopped at the bus stop (not 35 metres further on) and Mr Motaung was not seen there. A vendetta by Mr Motaung against Mr Mosia was also mentioned in the context of a bad relationship between them. Mr Mosia said he had no problems with the other inspectors employed by the applicant.

[13] The arbitrator concluded that the versions of the applicant and Mr Mosia were "equally probable" and that "none is more probable than the other". Therefore she concluded, the applicant had not discharged the onus of proving that the dismissal of Mr Mosia was fair.

[14] The arbitrator, who was steeped in the atmosphere of hearing the witnesses in a hearing *de novo,* made a credibility finding, having observed and listened to the witnesses. A review court should be very cautious before it interferes with a finding of that nature. Paramount in such an evaluation is the reminder that a review court is not a court of appeal. However, the distinction between a review and an appeal may have blurred over the years

in which the Labour Court and Labour Appeal Court have grappled over and developed the test on review.

[15] Even if I was remiss in judging the arbitrator's credibility findings in relation to the evidence presented, the facts on either party's version, does not lend themselves to support a finding that dismissal was the appropriate sanction in any avent.

[16] In the circumstances, the application for review must fail on both grounds and be dismissed with costs.

[17] The first respondent has also put up a case that the review should fail because of the alleged inordinate delay by the applicant in persuing this award, particularly with regards to the obtaining of the record. I do not see the need, in view of my findings above, to set out the exact manner in which the applicant dragged its feet in getting this matter before the court. I do however note that the applicant employed delaying tactics in this regard as set out by the first respondent in its head of argument. The applicant's delays are to be of significance once again, in evaluating the diligence with which it undertakes to comply with the granting of the first respondent's counter-application, namely to make the arbitrator's award an order of court, which was granted.

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E. REVELAS

REPORTABLE:	YES
DATE OF HEARING:	10 MARCH 2005
DATE OF JUDGMENT:	15 MARCH 2005
ON BEHALF OF THE APPLICANT:	Adv. APJ Du Plessis
INSTRUCTED BY:	JA Botha, Correspondents for Hofmeyr, Herbstein and Gihwala Attorneys
ON BEHALF OF THE RESPONDENT:	Adv. JG van der Riet S.C.
INSTRUCTED BY:	Cheadle Thompson and Haysom Attorneys