

REPORTABLE

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

CASE NO: JR929/02

In the matter between:

GAUTENG COACHES (PTY) LTD

Applicant

And

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

RALEFATANE N.O.

Second Respondent

NDAMBI TITUS KHUMALO

Third Respondent

JUDGEMENT

Mayet A J

INTRODUCTION

This is an application in terms of section 145 of the Labour Relations Act, No. 66 of 1995 as amended (“the Act”) and in terms of section 1581(1)(g) of the Act to review and set aside a ruling made by the first respondent (“the Commissioner”) in terms of which he found that the dismissal of the third respondent was

substantively unfair and awarded him ² R66 000.00 as compensation.

The application was not opposed.

BACKGROUND FACTS

The third respondent was employed as a supervisor by the applicant. During March 2000 it came to the applicant's attention that the third respondent together with other five employees was allegedly involved in the selling of fraudulent bus tickets to passengers.

The third respondent was accordingly charged as follows:

"Participating in the supply and sale of fraudulent tickets for own gain."

The third respondent was found guilty at a disciplinary hearing held on 16 May 2000 and was dismissed.

The third respondent referred a dismissal dispute to the CCMA for conciliation and arbitration. The matter was set down for hearing on 7 November 2001 and the Commissioner issued his award dated 16 November 2001 in favour of the third respondent. The Commissioner found that the third respondent's dismissal was substantively unfair and awarded the third respondent compensation in the amount of R66 000.00.

It is this award which the applicant seeks to review and set aside.

THE GROUNDS FOR REVIEW

It was contended on behalf of the applicant that the third respondent had challenged his dismissal only on the ground of procedural fairness. The Commissioner in making a finding on a different ground of substantive fairness committed misconduct in relation to his duties as a Commissioner, alternatively committed gross irregularity in the conduct of the arbitration proceedings, alternatively exceeded his powers.

It was further argued that the Commissioner misconstrued the evidence to the extent that the award is reviewable.

COMMISSIONER'S REASONS

The Commissioner found that there was no evidence to link the third respondent to the supply and sale of fraudulent bus tickets for personal gain. The Commissioner came to the conclusion that the third respondent was dismissed for refusing to submit himself to a polygraph test, even though there was no compulsion on employees to undergo a polygraph test at the request of the applicant.

THE LEGAL PRINCIPLES

Any party to a dispute who alleges an irregularity in any arbitration proceedings may apply to the Labour Courts for an order setting aside the arbitration award.

In terms of section 145(2) of the Labour Relations Act, No. 66 of 1995 as amended,referred to in section 145(1) means:

“(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.”

According to section 158(1)(g) of the Act, the Labour Court may:

“Subject to section 145, review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law.”

EVALUATION

It was common cause between the parties that the third respondent refused to submit himself to a polygraph test.

It was further common cause between the parties that the polygraph tests were

administered on a voluntary basis. There was no compulsion on any of the applicant's employees including the third respondent to undergo a polygraph test at the behest of the applicant.

In his opening statement at the disciplinary enquiry, the applicant's representative, one Fitzjohns, in his opening statement categorically denied that the dismissal of the third respondent was as a result of the polygraph test.

"Mr Khumalo's dismissal is not based on a result of the polygraph test."

See: Transcript, page 54, paragraphs 9 and 10

However this is contrary to the minutes of a disciplinary hearing held on 17 May 2000 under the heading: "Closing arguments by the Chairman who states that "the respondent was found guilty by the Chairman with the following reasons: *"I find you guilty – explanation given in polygraph accepted by the Labour Law. Discussion made with probability of guilt. He still did not really give a good reason why you refused to do the test."*

See: Court Bundle, page 32, paragraph 5

However under the heading "outcome", it is recorded as follows:

"He (Chairman) found the accused guilty on the charges as set out and recommended summary dismissal."

At the arbitration hearing the third respondent testified that he refused to undergo

a polygraph test because it was selectively administered. Certain managerial members of staff who were involved in the sale of tickets were not given the polygraph test at all. He also mentioned for the first time at the arbitration hearing that he refused to undergo the polygraph test because he believed that it would aggravate his hypertension. The third respondent was suffering from high blood pressure at the time.

In his award, the Commissioner states unequivocally that he was given the mandate to consider whether the third respondent's dismissal was both procedurally and substantively unfair.

This is in contrast to the third respondent's opening statement in which he states that:

"I am challenging the procedure I was unfairly dismissed procedurally."

See: Transcript, page 55, Lines 4 and 5

This should have alerted the Commissioner to confine her award to the procedural aspect of the disciplinary hearing. Instead she broadened the scope of the enquiry to include substantive fairness of the disciplinary enquiry when she questioned the failure of the applicant to lead evidence on the substantive aspects of the dismissal of the third respondent.

With respect, the Commissioner exceeded her powers when she took into account substantive aspects of the dismissal when the applicant correctly

answered only the procedural challenge raised by the third respondent at the arbitration hearing.

In the circumstances it cannot be said that the applicant was afforded a fair hearing because it was not given the opportunity to lead evidence on the substantive issues, in particular, the third respondent's involvement in the sale of fraudulent tickets.

See: Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others (2002) 23 ILJ 863 (LAC)

Where the parties agree that substantive fairness is not an issue, it is not open to the Commissioner to base a decision on a contrary finding of fact.

The Commissioner in so doing exceeded her powers and committed an irregularity which prevented the applicant from having a fair hearing.

In the circumstances the award cannot stand and must be reviewed and set aside.

Accordingly, I make the following award:

1. The ruling issued under Case No. GA122097 and dated 16th November 2001 is reviewed and set aside.
2. The dispute is referred to the CCMA for arbitration *de novo* before a Commissioner other than the second respondent.

3. I make no order as to costs.

Mayet A J

JUDGE OF THE LABOUR COURT OF SA

FOR THE APPLICANT: NICOLA KOULANTIS ATTORNEYS

FOR THE RESPONDENT: NO APPEARANCE

DATE OF HEARING: 16TH AUGUST 2007

DATE OF JUDGEMENT: