IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR 144 / 04

In the matter between**:**

Transport and Allied Workers Union of South Africa	**Applicant**
And	
South African Road Passenger Bargaining Council	**1st Respondent**
Tokiso Dispute Settlement (Pty) Ltd (Incorporating AMMSA)	**2nd Respondent**
Prof. M. Mthombeni N.O.	**3rd Respondent**
Unitrans Passenger (Pty) Ltd T/a Greyhound Coach Lines	**4th Respondent**

JUDGMENT

1. This is a review application brought by the applicant union on behalf of its members following an arbitration hearing in which the arbitrator found that the drivers who were employed as independent contractors were not entitled to be remunerated for compulsory rest periods.

2. The fourth respondent employed a number of passenger bus cabin crew members. Some of these members were employed as independent contractors. Those employed as independent contractors were not

remunerated for compulsory rest periods they spent in transit on long distance passenger buses. In April 2002, the fourth respondent changed the status of the independent contractors to that of permanent employees. The fourth respondent signed an agreement with the majority union in which it was agreed that the employees would not be paid for the compulsory rest period. The applicant filed a dispute regarding the payment for rest periods which resulted in the arbitration hearing. At the end of the hearing, the arbitrator issued an award which is now the subject of the review.

3. The grounds of review raised by the applicant appear in paragraph 8.2 of the founding affidavit filed by Zack Mangke. The applicant alleged that the first and or second respondent erred in the following respects:

a) Made findings without a rational objective bases justifying the connection made between the material properly available in the arbitration proceedings and the conclusion eventually arrived at.
b) Misconstrued oral and documentary evidence and ignored and misapplied legal principles to the extent that is inappropriate and unreasonable.
c) Committed misconduct in relation to arbitration duties.
d) Exceeded their powers.

4. Besides the bold allegations made by the applicant, it failed to set out the basis for these allegations.

5. The first, second and third respondents were requested to file a record of the arbitration hearing. The second and third respondents filed the arbitration notes and indicated that no mechanical recordings were made. After the court had made an order that the parties reconstruct the record, the applicant amended the notice of motion to allege a further ground of review to the effect that the arbitrator committed a gross irregularity in failing to keep a record of the proceedings.

6. The parties filed Heads of Argument. The applicant's Heads of Arguments dealt with only one review ground. The basis of which being that the arbitrator failed to keep the record of the proceedings.

7. The applicant submitted that the dispute has to be remitted to the first and second respondent for arbitration de novo as the record is not available and the court cannot determine the issues. I should point out that when the parties attempted to reconstruct the record, none of them had notes of the previous hearing. It was further submitted that the arbitrator's notes is not a record.

8. It appears from the founding affidavit and from the submissions made on behalf of the applicant that the main issue to be determined from the record is whether evidence was led to the effect that crew members were required to do work during rest periods.

9. I first wish to deal with the question of the record. It is common cause that no mechanical recording was made by the arbitrator. In paragraph 3 of the fourth respondent's answering affidavit, Mr. Fanie Van der Walt testified that :

> "…However, I am advised that it is necessary to provide this Honourable Court with an overview of the proceedings at the arbitration as no record of the oral evidence presented during the proceedings is available. The proceedings were not mechanically recorded. I am in a position to do so as I attended all the proceedings unlike Mangke who did not attend any of the proceedings."

10. Paragraph 7 of Mr. Mangke's founding affidavit gives the impression that the proceedings were mechanically recorded when in fact it was not. This is understandable as Mr. Mangke did not attend any of the arbitration hearings.

11. Mr. Grant Fleetwood filed an affidavit opposing the application to amend brought by the applicant.

12. In paragraph 5.1 to 5.3 of his affidavit, he stated that:

> "5.1 As indicated in the fourth respondent's affidavit in the review application, the first day of proceedings was given over to mediation.
>
> 5.2 On the commencement of the second day of proceedings, and I note that I attended all the days of the proceedings, unlike Lehong who did not attend at all, the third respondent (the arbitrator) informed the parties that it was the standard practice of the second respondent (Tokiso) not to mechanically record proceedings and if the parties wished to have such a recording, they would have to make their own arrangements.
>
> 5.3 After some discussion, both parties conveyed to the arbitrator their agreement that the matter should proceed without a mechanical recording."

13. The allegations made by Mr. Fleetwood have not been challenged by the applicant. Mr. Wilke who appeared on behalf of the applicant submitted that if the agreement on the recording was made on the second day, the applicant would accept it. He however argued that this was not a waiver of the recordings as the notes did not constitute a record.

14. If the parties had been advised before the commencement of the arbitration hearing that there would be no mechanical recordings and given an opportunity to make their own arrangements, it would be unfair to criticize the arbitrator for not mechanically recording the proceedings. In the present case, the parties agreed to proceed without the proceedings being mechanically recorded and did not make their own arrangements.

15. I do not agree that there was no record of the proceedings. It may well be argued that it was not accurate. The deponent to the founding affidavit did not attend any of the proceedings and cannot positively testify on what

was said during the arbitration. Mr. Lehong who filed the affidavit for the amendment also did not attend any of the proceedings. Their allegations are not based on facts within their personal knowledge.

16. In *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre* v *CCMA & Others* (2005) 5 BLLR 416 (LAC), the court had to deal with the question of the absence of the record and the reconstruction thereof. Comrie AJA stated that the commissioners are encouraged to make use of electronic recording equipment wherever possible.

17. At page 419 D-F Comrie AJA stated:

> "According to the rules then applicable, the first respondent was obliged to keep a record of any evidence given in an arbitration hearing, and of any award or ruling made by a commissioner. The rules provided "the record may be kept as handwritten notes or an electronic recording." Since the commissioner made use of an electronic recording, the desirable form, the probable inference is that he chose that form as the "official " record, and that his handwritten notes were no more than bench notes kept for the tribunal's convenience, as is the invariable practice among magistrates and judges. Though we have no definite statement to that effect from the commissioner himself, the parties appear to be in substantial agreement that the electronic recording constituted the record. I shall proceed upon that basis."

18. The position in the *Lifecare* matter can be distinguished from the present matter in that the mechanical recording had been made. The court correctly came to the conclusion that it was the mechanical recording that was regarded as the official record.

19. In the present case, the parties were left in no doubt that there would be no mechanical recording. The only recording is the hand written notes. The commissioner recorded the evidence of each of the witnesses. In the

light of the fact that the parties chose not to make their own arrangements for the mechanical recording, I assume that the arbitrator regarded his hand written notes not only as the bench notes but as the record. Accordingly I reject that these notes do not constitute a record.

20. The issue to be determined from the record is whether there was evidence that crew members were required to work during rest periods. The commissioner dealt with this point and decided it in favour of the fourth respondent. In this regard, the arbitrator found that :

> "I am convinced, that through the negotiations concerning payments for rest periods, the employer had consistently maintained its position not pay the new drivers for compulsory rest periods. I accept that it is inconceivable for the employer to abandon its position in this regard and agree to better terms and conditions of employment with a minority union. I also find it unlikely that an agreement of this nature could be concluded telephonically."

21. The applicant does not appear to have given any evidence to the effect that the crew members were required to perform certain duties during the rest periods. This is clear from the Heads of Argument submitted to the arbitrator. In paragraph 2.8.2 of the said Heads of Argument, the following was submitted in relation to the evidence of Gary Tala :

> "He testified that to show that drivers are on duty during compulsory rest period Mr. Adam Carolous was disciplined for leaving the coach when he was not driving. This shows that for all intents and purposes a resting driver is on duty and that such rest period is part of the normal hours of work and that such has to be remunerated."

22. It is my view that if there was evidence that the crew members were required to perform certain duties or did perform such duties, this would have appeared in the Heads of Argument. All that was done was to rely on

the inference from the act of disciplining Mr. Carolous. That is not sufficient to show that the crew was on duty during the resting periods.

23. Besides what I have indicated, the applicants have not set out why the award is irrational or what is irrational in the commissioner's findings. The award has not been attacked by the applicant. Can the applicant challenge the award only on the basis of the absence of the record? In my judgment before the dispute can be remitted for arbitration de novo for the absence of the record there must first be a real challenge on the award based on factual allegations which allegations could only be determined from the record. In the absence of the attack on the award, the award cannot be challenged only on the absence of the record. There has to be a real issue placed before the court.

24. I was referred to a judgment *in Uee-Dantex Explosives (Pty) Ltd* v *Maseko & Others* (2001) 22 ILJ 1905 (LC) for the proposition that the absence of the record is a ground for setting aside of an arbitration award. The *Uee Dantex* case is distinguishable from the present one. Firstly factual allegations were made by the applicant regarding the conduct of the commissioner. This prompted the court at paragraph 17 of the judgment to comment as follows:

> "There is a material dispute of fact going to the very heart of this review application which could only be resolved by looking at the record of the arbitration proceedings. Disputes of fact in application proceedings generally result in the courts either dismissing the application or referring the disputes to oral evidence."

25. No such disputes of facts are set out in the present matter. Secondly, in the *Uee Dantex* case no record of any form was submitted. In the present matter, the only form of record was the handwritten notes as no mechanical recording was made. The court was not confronted with the argument relating only to the absence of the record as in the present case.

26. The applicant had not alleged which evidence was ignored or misconstrued by the arbitrator. There is also no allegation made by the applicant regarding the manner in which it was alleged, the arbitrator exceeded his powers.

27. After considering the matter, I am satisfied that the applicant is simply not satisfied with the award. There is no basis for the review on the grounds raised. It is my view that this review was frivolous as no factual basis was set out right at the time the application was made. Accordingly, I find that the costs should follow the results.

28. The following order is made:

(a) The application for the review is dismissed.

(b) The applicant is ordered to pay the costs.

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NGCAMU AJ

Date of Hearing:	25 October 2006
Date of Judgment:	05 February 2007
For the Applicant:	Adv. F. Wilke instructed by Medufi Lehong Attorneys
For the Fourth Respondent:	Adv. C. Orr instructed by Bowman Gilfillan Inc.