1IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 283/05

In the matter between**:**

MEC FOR HEALTH (GAUTENG) **APPLICANT**

AND

BM MATHAMINI **FIRST RESPONDENT**

ZODWA MDLADLA N.O **SECOND RESPONDENT**

PUBLIC HEALTH AND WELFARE
BARGAINING COUNCIL THIRD RESPONDENT

JUDGMENT

MOLAHLEHI AJ

Introduction

1] This is an application in terms of which the applicant seeks an order to review and set aside the arbitration award issued by the second respondent (the arbitrator) under case no PHSS 211-03/04 dated 23 December 2004.

In terms of the arbitration award the arbitrator found the dismissal of the first respondent to be unfair and ordered both his reinstatement and compensation.

Background facts

2] The first respondent who initially, during August 1998, was appointed Deputy Director: Finance Procurement was during March 2002, appointed Director of Finance and Procurement. As a result of this appointment the first respondent had to relocate from Johannesburg to Ga -Rankuwa.

3] After a week of arrival at Ga-Rankuwa, the first respondent was advised that accommodation was not available for him within the hospital. He then went looking for accommodation and after finding one in Mamelodi, applied for a settlement allowance, which was approved by the applicant in the amount of R18 538.

4] At some point whilst staying at Mamelodi the first respondent was, according to him, advised that accommodation has become available in the hospital's hostel. After being shown the flat in the hospital hostel and being told that it needed to be cleaned the employee cancelled his Mamelodi lease. Thereafter, he was told that the flat was no longer available and had to apply for an interim accommodation which was approved by the applicant during June 2002.

5] The applicant was told after the approval that he would have to pay for the

accommodation as he had already received his settlement allowance. He refused to take responsibility for the payment of his accommodation which was at the Holiday Inn. The objection was followed by misconduct charges, he testified.

6] The first respondent was charged with five counts of misconduct. The arbitrator found him guilty of two of the charges. In determining whether or not the arbitrator's award is sustainable, this judgment focuses on the two charges only. The two charges for which the employee was found guilty of reads as follows:

> *" Charge 2*
> *Are guilty as listed in Annexure A to the disciplinary Code, which reads as follows 'while on duty, conducted herself or himself in an improper, disgraceful and unacceptable manner in that you authorised the inclusion of dinner and parking to the account from Holiday Inn.*
> *Charge 3*
> *Are guilty of misconduct as listed in Annexure A to the Disciplinary Code, which reads as follows: " Steals bribes or commits fraud" in that you submitted fraudulent petrol claims for the 22nd and 23rd of August 2002."*

7] The second charge related to the allegation that the first respondent authorized the inclusion of payment for dinner and parking to the main account for his stay at the Holiday Inn.

8] The first respondent testified during the arbitration hearing that it was the CEO who authorized the Holiday Inn accommodation after seeing all the supporting documents for the purposes of payment. She, according to the first respondent, made her decision on the basis of the three quotations, which were presented, to her.

9] The first respondent further denied having inserted into the order form for the payment of the Holiday Inn, payment for food and parking but conceded that he had signed below the insertion. He testified that he had signed below the insertion as per the requirements of the treasury regulations. He stated in relation to why he did not bring this to the attention of the CEO that it was not his responsibility.

10] In finding the second respondent guilty of the second charge the arbitrator reasoned:

> "The problem is that the quotation covers various things and the applicant should have advised the CEO that his [sic] should cover food and parking. I accept the respondent [sic] that the applicant was not supposed to write the letter that appears at page 13B authorizing food and parking for his stay."

11] As concerning the third charge the arbitrator reasoned as follows:

> *"Although I accept that the applicant made alterations and signed in terms of the Treasury Instructions H1.3 he should have gone back to the CEO and advised her of the changes more especially that it was his order that has [sic] already been approved."*

12] The arbitrator, having found the employee guilty of acts of dishonesty ordered his reinstatement including payment of "all his remuneration and benefits that he lost as a result of the dismissal."

13] The reason for interfering with the decision to dismiss is set out in the award as follows:

> "Be it serious as it may look that the applicant altered the document after the CEO has signed it, and that he authorized food and parking for his accommodation I am convinced that it did not warrant dismissal because if he went to her she would have authorized it since when the employee is accommodated in a hotel the State pays for food and parking. The applicant was just a first offender and the respondent should have applied progressive discipline by issuing him with a written warning valid for six months."

Interfering with the sanction

14] It is apparent that the arbitrator interfered with the decision of the applicant for two reasons. The arbitrator found that the CEO would have in any case approved for food and parking had the first respondent sought her approval. The second reason is that the first respondent was a first offender. In other words the severity of the sanction was mitigated by the fact that the first respondent was a first offender. In adopting this approach the arbitrator committed a gross irregularity in that she misdirected herself in applying an incorrect test of determining whether she should interfere with the decision of the applicant.

15] There is authority that the discretion to determine a sanction in a disciplinary hearing lies with the employer and not the arbitrator. The discretion of the arbitrators is limited to determining the fairness of the sanction. The criterion is not whether an arbitrator would have imposed a different sanction or he/she did not like the sanction. The question is not whether the sanction is correct, or the commissioner agrees with it. The question is whether the sanction is fair or not.

16] The powers of a commissioner or arbitrator to interfere with the sanction of the employer, was dealt with by Cameron JA in *Rustenburg Platinum Mines LTD (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021(SCA) had this to say:

> "… a CCMA commissioner is not vested with a discretion to impose a sanction in the case of work place incapacity or misconduct. The discretion belongs in the first instance to the employer. The commissioner enjoys no discretion in relation to the sanction, but bears the duty of determining whether the employer's sanction is fair."

17] With regard to the issue of mitigating circumstances, an employment relationship broken down as a result of an act of dishonesty can never be restored by whatever amount of mitigation. This Court held in the unreported case of *Abdool Kalik v Truworths case number D600-05*, that the underlying reason for this approach that says mitigation can never repair relationship damaged by dishonesty is that an employer cannot be expected to keep dishonest employees in his/her employ. The Court

further held that the other reason for this is to send an unequivocal message to other employees that dishonesty will not be tolerated. See *Consani Engineering (PTY) LTD v Commissioner for Conciliation, Mediation and Arbitration and Others (2004) 25 ILJ 1707 (LC*). The other rational for this approach is also informed by the consideration that a worker with an unblemished record, as is the case in the present case, can not after an incident relating to an act of dishonesty, continue to be trusted. It is the operational risk to the business of an employer that arises from the dishonest conduct that cancels off whatever good record the worker may have had before the commission of the offence. In other words there would be no purpose in conducting an inquiry into mitigating circumstances where a worker is guilty of misconduct relating to dishonesty.

18] The two reasons for not keeping a dishonest employee even in the face of strong mitigating factors are well articulated by Grogan: *Dismissal* (Juta Cape 2002) at 99, and quoted with approval by Murphy AJ in *Consoni Engineering (supra)* says:

> "An employer has two reasons for wanting to rid itself of a dishonest employee. One is that employee can no longer be trusted. The other less frequently acknowledged but no less legitimate, is the need to send a signal to other employees that dishonesty will not be tolerated. This consideration relates to the deterrence theory of punishment. The question to be asked is whether a repetition of the misconduct, either by the same employee or by others, will adversely affect the employer's business, the safety of the workforce and/or the employer's trading

reputation."

19] In the circumstances of this case I do not belief that costs should follow the result. I also see no reason for referring this matter to the third respondent, the material before court being sufficient for it to make a determination.

20] In the premises I make the following order:

(a) The arbitration award issued by second respondent is reviewed and set aside.

(b) The arbitration award of the second respondent is substituted with the following:

(i) The dismissal of the first respondent by the applicant was for a fair reason.

(ii) The dismissal of the first respondent by the applicant is confirmed.

MOLAHLEHI AJ

DATE OF HEARING: 20 JUNE 2007

DATE OF JUDGMENT: **19 SEPTEMBER 2007**

APPEARANCE

For the Applicant: **Adv M B Matlejoane**
Instructed By: **Kathrada Norval Rice Patel Attorneys**

FOR THE RESPONDENT: **NKOPANE THAANYANE OF THAANYANE ATTORNEYS**

INSTRUCTED BY: **STATE ATTORNEY**