

REPORTABLE

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

CASE NO: JR208/03

In the matter between:

**J D TRADING (PTY) LTD T/A GIDDY'S ELECTRIC
EXPRESS**

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

RALEFATANE M J N.O.

Second Respondent

ECCAWUSA o.b.o M MAKWAKWA

Third Respondent

JUDGMENT

Mayet A J

INTRODUCTION

[1] This is an application in terms of section 145 of the Labour Relations Act, No. 6 of 1995, as amended ("the Act") in which the applicant seeks to review and set aside the arbitration award handed down by the second respondent ("the Commissioner") on

20 December 2002 under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

[2] The application was opposed.

BACKGROUND

[3] The third respondent was employed by the applicant as a Store Manager of its Dobsonville branch until her dismissal on 02 October 2001.

[4] The third respondent was responsible for management of the store and for meeting monthly sales targets set for the Dobsonville branch.

[5] During April 2001, the applicant's CEO, one Chamers, noticed that the cancellation of sales at the Dobsonville branch was alarmingly high and way above the norm at other branches.

[6] It was found that the Dobsonville branch had the highest incidents of cancellation out of a total of 105 branches. Cancellations for the month of August 2001 amounted to R60 000.00 at the Dobsonville branch as opposed to other branches where cancellations amounted to R15 000.00 per month on average.

[7] The applicant's divisional administrative manager, Janet Fallon, carried out an investigation of the cancellations at the Dobsonville branch. She found that there was an unusual amount of invoices made out to customers who did not purchase goods, nor pay for them.

[8] The fictitious transactions inflated the total of the sales made at the Dobsonville branch. These fictitious transactions were created on the computer by generating a hire purchase agreement in the name of a customer, but in actual fact, there was no physical sale of the goods. The sale was later cancelled on the computer. In this way the number of sales was inflated in that month to meet the branch target. More importantly, the branch manager received a cash incentive for meeting the sales target.

[9] The third respondent, as branch manager, was the only employee at the Dobsonville branch with access control to the computer system. The fictitious transactions could only have been created by her.

[10] The loss controls department investigated the fictitious sales at Dobsonville branch and uncovered, amongst others, the following fictitious transactions:

[10.1] Ndiliza was an existing customer who had paid up all his instalments. An amount of R2 264.28 was invoiced on this account for a refrigerator allegedly bought on his account on 03 April 2001 when in fact no such transaction had taken place. There was no deposit and no instalments paid. The sale was reversed in June 2001.

[10.2] The Blaai transaction was also an existing customer who was paying off an account. The fictitious sale in respect of the purchase of a LG hi-fi was created on Blaai's account in August 2001. The payments made by Blaai on his legitimate account were moved back and forth between the fictitious and legitimate accounts to simulate payment on the fictitious account. No goods were sold or delivered to Blaai in August 2001.

[11] Du Plessis of the loss control department found a total of eleven specific incidents relating to fictitious transactions which could be traced back to the third respondent.

[12] At the disciplinary enquiry which took place on 26 September 2001, the third respondent was represented by her union representative, one Sipho Nkosi. The third respondent was found guilty on five charges and dismissed on 02 October 2001.

[13]The thirds respondent lodged an appeal against her dismissal.

The appeal was dismissed.

[14]The third respondent referred an unfair dismissal dispute to the CCMA and the arbitration hearing was finally heard on 20 October 2002.

[15]The commissioner found that the applicant's dismissal was procedurally and substantively unfair and awarded the third respondent reinstatement with immediate effect together with back-pay in the amount of R34 800.00. It is this award which the applicant seeks to review and set aside.

GROUND FOR REVIEW

[16]It was argued on behalf of the applicant that the arbitration award was to be reviewed and set aside by reason of a number of irregularities perpetrated by the commissioner in the conduct of the proceedings. In particular the applicant was denied a fair hearing in that:

[16.1] The commissioner failed to apply her mind to the documentary evidence and testimony of expert witnesses;

[16.2] The commissioner based her findings on the “lack of challenge” by the applicant to evidence put forward by the third respondent even though the third respondent did not lead any witnesses but merely made unsubstantiated statements;

[16.3] The commissioner adjourned the proceedings to establish contact with some of the applicant’s customers;

[16.4] The commissioner’s findings were neither rational nor justifiable in relation to the reasons given for it;

[16.5] The commissioner was biased in that she focused only on three transactions when in fact evidence was led on five fictitious transactions committed by the third respondent.

PROCEDURAL FAIRNESS

[17]It was the third respondent’s testimony that the disciplinary hearing was procedurally unfair because the chairperson was biased and did not allow her to lead evidence in mitigation.

[18]The transcript of the disciplinary hearing reflects that the third respondent was represented by her union representative, one

Sipho Nkosi. The minutes of the disciplinary hearing were accepted as a true reflection of the proceedings by the third respondent and her representative who both duly appended their signatures to the minutes without raising any queries.¹

[19]The third respondent lodged an appeal against her dismissal. However, the third respondent did not raise any procedural issues in her appeal.²

[20]In finding that the disciplinary hearing was procedurally unfair the commissioner relied on, and accepted the evidence of the third respondent that the chairperson was biased in that he favoured the witnesses brought forward by the applicant and did not allow the third respondent to lead evidence in mitigation after the chairperson had found her guilty.

[21]The procedural fairness of the disciplinary hearing was not called into question by the third respondent at the arbitration. In fact she made no opening statement. It was only in relation to questions put forward by the commissioner that the third respondent alleged that her representative was interrupted during his cross-examination of the applicant's witnesses by the chairperson.

¹ See Bundle page 198 to 202

² See Bundle page 204

Moreover her representative was not allowed to address the disciplinary hearing on mitigating factors after a finding of guilty had been entered against her by the chairperson.

[22]The commissioner committed a gross irregularity when she accepted the third respondent's version that the disciplinary hearing was procedurally unfair when this version was not put to any of the applicant's witnesses in cross-examination. The commissioner allowed this aspect of the third respondent's testimony without giving the applicant an opportunity to rebut this evidence in line with the *audi alteram partem* rule.

[23]The third respondent failed to call in her union representative to corroborate her evidence regarding the alleged procedural unfairness of the disciplinary enquiry.

[24]In so doing the commissioner exceeded her powers and committed an irregularity of the kind that prevented the applicant from having a fair hearing.

SUBSTANTIVE FAIRNESS

[25]The commissioner's award was challenged for failing to take into account pertinent evidence and accepting the uncorroborated

evidence of a single witness without making any credibility findings.

[26]The third respondent denied that the commissioner failed to apply her mind to all the evidentiary material placed before her. The third respondent was of the view that if that had been the case, the commissioner would not have adjourned the proceedings to allow the parties to furnish answers to written questions raised by the commissioner.

[27]The third respondent was charged with eleven counts of fraud pertaining to the creation of fictitious transactions to inflate the number of sales at the Dobsonville branch. The commissioner found that the Dobsonville branch had the highest cancellation of sales amounting to R60 000.00 for the month of August.

[28]In reaching her decision the commissioner focussed on three of the five transactions on which the third respondent was found guilty. The three transactions relate to the following customers, namely, Ndilize, Blaai and Caroline Duda respectively.

[29]The applicant's uncontested evidence that in all three transactions investigated by its loss department no deposit was

paid and no goods delivered was rejected by the commissioner on the basis that the applicant had failed to prove the irregularities complained of.

[30] Instead the commissioner accepted the sole evidence of the third respondent even though her version was not put to any of the applicant's witnesses during their cross-examination at the arbitration hearing and despite the fact that this version was not raised at the disciplinary enquiry.

[31] In so doing the commissioner failed to appreciate that the third respondent, as branch manager, was the only employee at Dobsonville with authority to access the computer. The fictitious transactions could have only been entered into the computer by the third respondent.

[32] In **Marapula & Others v Consteen (Pty) Ltd 1999 20 ILJ 1837 (LC)** it was held that:

“The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an

investigation where questions of demeanour and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and maybe rejected with safety."

[33]The commissioner ignored all documentary evidence in particular, the sworn statements of the affected customers who state under oath that they had not entered into any of the fictitious transactions created in their name and that they neither paid nor received any goods in respect of the fictitious transactions. The affected customers felt aggrieved by the fact that their names had been used to generate fictitious transactions

[34]The commissioner's conduct of the arbitration proceedings was called into question by the applicant for the manner in which the arbitration proceedings were adjourned to allow the parties to respond to the commissioner's written questions. The applicant

was of the view that the interruption of the proceedings by the commissioner was done to give unfair advantage to the third respondent and this shows that the commissioner was biased.

[35]I am of the view that the commissioner has the discretion to conduct the proceedings in the manner she deems fit without detracting from the common law principles required for a fair hearing. The commissioner cannot be faulted for adjourning the proceedings to allow both parties to respond to the questions raised by her.

[36]While I have found that the commissioner was not biased in the way she conducted the proceedings I do not believe that the award is rationally justifiable with the reasons given for it. The commissioner completely ignored the entire disciplinary hearing and the record of the appeal as well as the sworn statements which form part of the applicant's bundle. This is clearly irregular and in so doing, the commissioner failed to appreciate the true issues in dispute and this amounts to a gross irregularity which justifies the review and setting aside of the award.

[37]By all accounts, the applicant has in my view presented a compelling case for the review and setting aside of the commissioner's award.

[38]The applicant has submitted that the court should substitute its decision for that of the commissioner in the event of the application for review being upheld. I am not satisfied that this court is in a position to make a finding of fact on the papers. One of the issues which must be determined is the credibility of the witnesses and that is pre-eminently a matter which falls within the domain of the person presiding over the hearing. The presiding officer has advantages which this court cannot have in seeing and hearing the witnesses and in being immersed in the atmosphere of the hearing so as to observe the demeanour of witnesses, their appearance and mannerisms.

[39]There is no reason why costs should not follow the result.

[40] In the premises I make the following award:

1. The arbitration award issued by commissioner Ralefatane, the Commissioner for the CCMA under Case No. GA23916/610

and dated 20 December 2002 is hereby reviewed and set aside.

2. The matter is referred back to the CCMA for the appointment of an arbitrator other than the second respondent to re-hear the case.
3. The third respondent is to pay the costs.

Mayet A J
Acting Judge of the Labour Court of SA

Date of hearing: 11 September 2007

Date of judgment: 12 September 2008

APPEARANCES:

For the applicant: Mr S Snyman of Snyman Attorneys

For the third respondent: Mr S. Mbau of Nomali Tshabalala
Attorneys

