IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN **CASE NO. D375/08**

IN THE MATTER BETWEEN:-

AMPATH TRUST t/a DR BOUWER AND PARTNERS INC **APPLICANT**

AND

KM DLALA **FIRST RESPONDENT**

COMMISSIONER KEMI N.O. **SECOND RESPONDENT**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **THIRD RESPONDENT**

JUDGMENT

GUSH, A J

1. The Applicant applies to review and set aside the award of the Second Respondent who found that the dismissal of the First Respondent by the Applicant was substantively and procedurally unfair and ordered that the Applicant retrospectively reinstate the First Respondent.

2. The First Respondent was employed by the Applicant on the 1st April 2003 as a driver. The Applicant was dismissed on the 31st October 2007 following a disciplinary enquiry into his misconduct. The First Respondent was found guilty of carrying a passenger in his company vehicle on Monday 15th, Tuesday 16th and Thursday 18th October on the N2 between "Kwambo and Nseleni".

4. It was common cause that that there was rule in force that drivers employed by the Applicant were not entitled to convey passengers in company vehicles.

5. The disciplinary enquiry, which was chaired by a Mr McConnachie an employee of the Applicant, commenced on the 26th October 2007 and was concluded on the 31st October 2007 when the 1st Respondent was dismissed.

6. The disciplinary enquiry was attended by, in addition to McConnachie, the HR Representative Taryn Germaine, (who later represented the Applicant at the arbitration), the Applicant's representative or "complainant" Stacey Jones, the Applicant's witness Estie Corson and the 1ST Respondent, his representative and an interpreter.

7. The "summary minutes" of the enquiry reflect that at the commencement of the enquiry Jones advised the Chairperson that Corson had advised her, "through Janine" that she had seen the 1st Respondent with a passenger in his vehicle on the 15th 16th and 18th October. She said further that she "pulled reports" from the vehicle tracking system where one could see where stops were made and that 1st Respondent had had no reason to stop at the places reflected on those reports. She said that she had confronted the 1st Respondent and that he had denied the allegation. She further said that she had proof that the 1st Respondent was driving the vehicle. In addition she read out Corson's statement. The minute does not indicate that this was evidence and it seems that this information was tendered as a summary or opening statement. Jones was not

cross examined. None of the physical evidence was placed before the disciplinary enquiry nor were any written reports handed in.

8. The Chair of the enquiry then invited the "complainant" Jones to call witnesses. Only one witness was called viz. Estie Corson, who said that she had observed the 1st Respondent driving the vehicle on the dates in question and had had with him a passenger. Her evidence was that when she first saw the First Respondent conveying passengers she decided to keep quiet but that having seen him conveying passengers again on the 16th and the 18th she decided to report the matter to one of her superiors.

9. She said further that this was not the first time that she had seen him conveying passengers and that she had some months earlier seen him carrying passengers. She had confronted the 1st Respondent and he had asked her not to say anything.

10. The 1st Respondent denied that he had at any stage conveyed passengers and also denied that Corson had spoken to him earlier about conveying passengers. In fact his representative submitted during the enquiry that there was no proof and no case against the 1st Respondent.

11. At the conclusion of the evidence McConnachie invited Corson and the 1st Respondent to undergo a polygraph test. At the arbitration the reason he gave for asking the 1st Respondent and Corson to undergo a polygraph test was that "…*there were conflicting statements, the polygraph was suggested as a means of supporting one or other argument*…"

12. Subsequent to having agreed to undergo the polygraph test the First Respondent later refused and McConnachie finalised the disciplinary enquiry, finding the First Respondent guilty of the misconduct and dismissed him.

13. The First Respondent referred a dispute to the CCMA which dispute was conciliated and referred to Arbitration. The Arbitration took place before the Second Respondent on the 20th January 2008 and the 18th March 2008.

14. The issue that was to be decided by the Second Respondent was whether the dismissal of the 1st Respondent was substantively and procedurally fair. At the Arbitration the Applicant was represented by Ms T Germaine who as is noted above was present at the disciplinary enquiry but, as reflected in the summary minute, did not participate in the enquiry. Germaine was accordingly familiar with what had transpired at the disciplinary enquiry.

15. At the commencement of the arbitration 2nd Respondent invited both parties to make opening statements. During her opening statement the Applicant's Germaine referred to the Applicants bundle of documents and to what the evidence was surrounding the dispute.

16. On three separate occasions during the opening statement the 2nd Respondent cautioned Germaine on the need to call witnesses to prove the documents in the bundle and to give evidence.

    2nd Respondent: "*your witness will need to lead (sic) evidence about the documents,…"*

    Germaine; *"Okay";*

    2nd Respondent: *"One second. This is just the opening statement, your witness will need to testify about the documentation, all right?"*

    Germaine; *"Okay";* and

    2nd Respondent: *"Remember, this is just your opening statement, evidence is going to be led that's going to carry more weight than the opening statement"*

    Germaine; *"Sure"*

17. Despite this Germaine thereafter indicated that she intended calling only one witness but ultimately ended up calling not only Corson who she had indicated

was her only witness but also called Mr McConnachie as a witness. She appears not to have made any attempt to prove the documents or even deal with them in the evidence she led.

18. It is clear from the record that the Applicant did not present any evidence to corroborate Corson's version. In the circumstances 2nd Respondent was faced with two conflicting statements.

19. In addition it must be noted that Germaine had been present at the disciplinary enquiry and was well aware of the fact that the 1st Respondent had denied almost everything. She must in addition been aware of the fact that the chair of the disciplinary enquiry was sufficiently uncertain when faced with the two conflicting versions to suggest that the two witnesses submit to a polygraph test.

20. A further ground upon which the Applicant bases this review is that the 2nd Respondent should not have rejected the evidence of Corson. It is clear from the record that 2nd Respondent was in no better position than the Chair of the enquiry, McConnachie, when it came to the evidence. In the case of McConnachie he was sufficiently uncertain as to whose evidence he preferred to "*suggest*" that a polygraph was necessary to deal with the two *"conflicting statements".* 2nd Respondent in her award analyses the evidence before her, taking into account the onus on the Applicant and rejects it concluding that the Applicant had failed to "prove on a balance of probabilities that the 1st Respondent was guilty of the misconduct. In the absence of any corroborating evidence it is not possible to gainsay the 2nd Respondents conclusions.

21. During the arbitration McConnachie repeatedly denied that the refusal of the 1st Respondent to undergo the polygraph had anything to do with his dismissal. This stands in stark contrast to the reasons he advanced for his decision in the "Outcome of Disciplinary Enquiry" viz:

- *"a witness to you carrying passengers took the polygraph test and was deemed to be truthful in her statement;*
- *you were offered the opportunity to undergo a polygraph test to support your claim of innocence, however after accepting the offer , you subsequently declined the offer"*

22. As far as the evidence of Stacy Jones is concerned, which is one of the grounds of review upon which the Applicant relies, Germaine on behalf of the Applicant makes an averment in her founding affidavit that "*The Second Respondent* ***unreasonably and unjustifiably denied*** *the Applicant the right to call Stacy Jones, the area manager and complainant in the disciplinary enquiry to give evidence*" (my emphasis). This is an extremely serious averment. This however must be contrasted with Germaine's replying affidavit where she appears to abandon this averment without explanation or excuse, and, in response to the 1st Respondents challenge says "*I asked Second Respondent if I could lead Stacy Jones as a witness. I was told that it was not advisable…*" These two versions are totally irreconcilable and accordingly the suggestion that there was interference by the 2nd Respondent in the decision regarding the calling of Jones must be rejected.

23. In the matter of Edcon v Pillemer, Mlambo JA set out clearly the standard of review to be applied in matters of this nature.

> *"Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at* ***considering the material placed before him****. It is therefore the reasonableness of the award that becomes the focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but* ***also on the material that was before the commissioner*** *when making the award." (my emphasis)*

Edcon v Pillemer (191/2008) [2009] ZASCA para 15 and 16

24. A careful consideration of the material placed before the 2nd Respondent during the arbitration, as reflected from the record of the arbitration hearing, does not support the Applicant's submission that the award is one that a reasonable decision maker could not make. Despite the repeated warnings to the Applicants representative, Germaine, at the arbitration, she appears to have ignored the advice directly given to her by the 2nd Respondent and made no effort to prove the submissions she made during her opening statement or prove the documents in the bundle she handed in, particularly the documents which purported to have been signed by the 1st Respondent. The 2nd Respondent was accordingly left with only the oral evidence of Corson and McConnachie for the Applicant.

25. The Applicant submitted further that the 2nd Respondent made herself guilty of reviewable misconduct in that she interfered unduly in the arbitration proceedings. Whilst it is so that the 2nd Respondent participated actively in the proceedings it cannot be said that her conduct constituted misconduct or could be regarded as a gross irregularity. Her conduct was well within the bounds of section 138 (1) and (2) of the Labour Relations Act 66 of 1995.

26. In this regard it was the Applicant's case that a reasonable Arbitrator when discharging her responsibilities in accordance with the provisions of Section 138 of the Labour Relations Act should ensure that where parties are unrepresented that they are guided through the process in order to reach a fair and proper result. The 2nd Respondents involvement appears from the record to have been designed to achieve this. It must be noted that the Applicant 's representative described herself at the commencement of the arbitration as a "senior HR officer".

27. What is abundantly clear in this matter is that the Applicant's representative despite being advised categorically at the commencement of the arbitration that it would be necessary to prove the contents of the bundle of documents and the submissions made in the opening statement, studiously ignored this advice and neither proved the exhibits contained in the bundles she handed in nor did she call the witnesses who could have corroborated the evidence of her witness Corson and help to establish the misconduct of the First Respondent. She was aware of the denial by the 1st Respondent of all the allegations at the disciplinary enquiry. The issue surrounding the Applicant's submissions regarding the calling of the witness Jones are dealt with above.

28. This left the 2nd Respondent in the position of having to make a decision based on the "material" before her. In the light of the above her decision **is** "one *that a reasonable decision maker could arrive at…*" and therefore I am of the view that the award of the 2nd Respondent is not reviewable.

29. The Applicant also seeks to review and set aside that part of the 2nd Respondents award that found that the dismissal was procedurally unfair. It might well be so that this part of the award is reviewable. However given that the 2nd Respondent found that the Applicant had not "*proved on a balance of probabilities that the [1st Respondent] is guilty of the charge"* and that this part of the award is not reviewable, a finding that that part of the award dealing with the procedural fairness is reviewable would have no bearing on the reinstatement of the 1st Respondent.

30. I accordingly dismiss the Applicant's application. There is no order as to costs.

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GUSH AJ