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IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: **D713/03**

DATE: 2007/06/26

In the matter between

BUHLE Z MIYA	Applicant
and	
COMBINED TRANSPORT SERVICES	1st Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	2nd Respondent
COMMSSIONER A DEYZEL	3rd Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE CELE
ON 26 JUNE 2007

CELE AJ

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (hereafter referred to as "the Act") to review and set aside an arbitration award dated 12 October 2003 issued by the third respondent under the auspices of the second respondent.

[2] The first respondent, in whose favour the award was issued, opposed the review application.

[3] The applicant was employed by the first respondent as a bus driver.

For cash-paying passengers he had to issue tickets. Some of the passengers would be using coupons. The applicant was on duty on 30 May 2001. He had to start his tour of duty at Ekukanyeni at Inanda at about 04:55 on the route from Inanda or Ekukanyeni to Lorne Street in Durban. He drove down to Durban and then came back and whilst he was at Inanda, I think it was, at the second trip two bus inspectors came in to do their routine inspection. These were Messrs Thembe and Mtolo. Upon that inspection it came to light that eight passengers were without tickets. It would appear that this matter was discussed between the driver, Mr Miya, and the inspectors.

[4] The applicant was subsequently charged with an act of misconduct. It was sort of framed in that the inspector found eight people without tickets in a bus driven by him. The matter was set down for a disciplinary hearing. He arrived there but he did not stay. As the hearing was about to commence he then appears to have walked out. What happened thereafter is in dispute but what is clear is that out of that sitting he was then dismissed.

[5] He was not satisfied and then he referred a dispute about an unfair dismissal to the CCMA and the matter was not resolved. He referred it to arbitration which also finalised the matter. Once it was finalised – I have not checked but one of the parties was not happy.

[6] The matter was submitted to this Court for a review which was successful. It was sent back for a second arbitration hearing.

[7] It is the outcome of that hearing which is before this Court. It is before this Court because the commissioner in his award found that the dismissal was substantively and procedurally fair and he found that the applicant was not entitled to any relief. That award issued by Commissioner Deyzel is the subject of the review today.

[8] The grounds for review. As indicated the applicant relies on section 145 and has proffered the following:

1. that the commissioner failed to consider and to properly evaluate relevant and admissible evidence placed before him;
2. that he failed to assess the evidence and argument presented to him in any adequate way, or at all;
3. that he failed to weigh up probabilities at all and/or in an adequate way;
4. that he failed to assess the credibility of some and/or all witnesses at all and/or in any adequate way;
5. that he issued an arbitration award which is not justifiable in relation to the reasons given for it;
6. that he reached conclusions which are not capable of reasonable justification when regard is had to the factual premise on which they are based;

7. that he failed to take into account relevant considerations and made findings which are not supported by the evidence;

8. that he issued an arbitration award which is not appropriate, and thereby exceeded his powers; alternatively

9. that he issued an award which is unreasonable and/or grossly unreasonable.

[9] Coming very briefly to the award itself, the commissioner conceded that there were contradictions in the evidence of the witnesses of the first respondent but, having made that observation, he still found that on the probabilities the evidence of the first respondent was satisfactory enough and rejected that of the applicant.

[10] One important witness in the hearing was a Mr Ngcobo. According to the applicant, Mr Ngcobo would have – firstly, according to his version, he said that just before he started his tour of duty he was fidgeting with the machine. I think he was setting it right, trying to attend to the first passenger when a number of tickets got released when the button he was pressing on the machine got stuck. That resulted in a number of R6 tickets being issued without any money corresponding to that coming his way through the customers so he gave the first ticket to the first passenger who came in and then went on to work. It appears that the machine was then fine but on the way as he drove Mr Ngcobo, an inspector, came in and he explained his predicament and Mr Ngcobo understood and then told him to make

use of these tickets. So if there would be any passenger who would be paying R3 and there would be two of them he would have to issue one ticket for the two persons. Mr Ngcobo at some stage alighted from the bus and as the bus went on, somewhere along the line, it would seem Mr Ngcobo may have been using a motor vehicle because at the crossroad that is in KwaMashu Mr Ngcobo again boarded the bus and asked whether there were still any R6 tickets available. The applicant told him that he had not used all of them and so he was advised by Mr Ngcobo, who was standing next to him, that he could still continue to use such R6 tickets. He parted ways with Mr Ngcobo. He continued with his duties and thereafter later on in the day the two inspectors came in and, according to him, when they came in, that is Inspectors Mtolo and Thembe, he then explained to them what had happened and the instruction which he had received. Apparently they were not too happy with that explanation and that led to him being charged.

[11] In the two arbitration hearings that were conducted it would appear from the issues between the parties that Mr Mtolo gave two conflicting versions. In the first hearing, the initial one, around the question of the issue of the replacement tickets to balance up when it was found that there was a problem with eight people without tickets, Mr Mtolo's evidence was that the inspectors had instructed the applicant to issue the replacement tickets. When it came to the second arbitration hearing Mr Mtolo's version was that they had not

issued such instructions to the applicant but he dialled these all by himself, knowing the wrong that he was up and about which was obviously a very material contradiction in this respect. But from the record it would appear that Mr Mtolo seemed not to have recalled very well his evidence because it would seem to be a version of his opinion, that he was giving his opinion that he thought that the applicant had been given instructions. It would seem to be that about the instruction was more of an opinion that a direct instruction but it would seem from the records that he did give these two conflicting versions because when one looks at the award itself, the commissioner does recognise it and notwithstanding that he does find in favour of the first respondent. In the inquiry again there are obviously two versions given by Mtolo as to what happened but I need not waste any time there.

[12] I come back to the evidence of the applicant vis-à-vis that of Ngcobo. I think it is critical to look at the two versions because if the version of the applicant were to be sustained to be probably true it could seek to explain the reason why he acted as he did. Mr Ngcobo came across initially as a witness who knew what he was testifying about but later on when he was cross-examined it appeared clear that he did not have a clear memory of the incident that he was testifying about. That is why the commissioner in his assessment of the evidence suggested Ngcobo was not deliberately lying but rather that he was merely testifying about a routine practice, going to Pinetown and working there, and that he did not really intend to lie but it is

clear from a proper conspectus of the evidence that Ngcobo gave that his evidence was just a contradictory version which could not be safely relied upon, and on that score alone one would then have expected that when the evidence of the first respondent through Ngcobo is measured against that of the applicant, the applicant's version should have been sustained.

[13] Coming then to the version of Mtolo and Thembe, where there were contradictions again in respect of Mtolo who testified in the second hearing, where there were contradictions again the commissioner should have, in my view, not quickly accepted the version of the first respondent because when one looks at the explanation around the replacement tickets it tells a story. If it is true that the inspectors did instruct the applicant to issue the replacement tickets it would be because there would have been an explanation that would have been proffered by the applicant and if that explanation was tendered it would seem to be the only explanation that would have been around Ngcobo because there is no other explanation. The second version begs the question, why would he then dial on his own and why would Mtolo change that version? The second version should have cast doubt as to the truthfulness of the evidence of Mtolo because of the first version, which first version would probably have been in favour of the applicant, suggesting that the applicant had proffered an explanation. So there should have been doubt in the mind of the commissioner when looking at the two versions that

Mtolo presented around a replacement ticket and that doubt itself should have gone a long way in favour of the applicant.

[14] In my view therefore the commissioner committed a serious error when he began to evaluate the evidence of the first respondent through its witnesses, particularly in relation to the first and the second versions presented by Mtolo around the issue of the replacement tickets and in my view that evidence was very critical in the decision-making process.

[15] I share the same view therefore with the applicant that the manner the commissioner went about in assessing this evidentiary material was marred with a serious error and that itself alone allows me to review the award.

[16] I come to the second aspect relating to the question whether or not, being faced with this kind of allegation that the commissioner was right in coming to the assumption that he, did but I think I need not waste much time on that because I have already found that the assessment of the evidentiary material was incorrect and that therefore I need not even go further and look at the effect the incident of 21 May would have on the question whether or not the applicant ought to have been dismissed.

[17] This is one of those unfortunate cases where evidence is lying all over the documents here because there was a reconstruction and

because there were two hearings.

[18] I do not think this is a case which is appropriate for me to even find in favour of the applicant and say that he was unfairly dismissed. I do not think this is a case where the nature of the evidence that is before me justifies that I should accede to the order prayed for in paragraph 1 of the notice of motion, namely to reinstate the applicant with retrospective effect. I think it would be unfair in the light of the nature of the evidence that is before me.

[19] The unfortunate situation that I find confronting me is that the matter should again be referred for another arbitration hearing before another commissioner. Seeing that it would be the third time round, I would urge the second respondent to expedite the matter by prioritising it and setting it down for an earlier hearing, firstly. Secondly, I would urge the parties to desist from allowing the practice there to prevail which will result in any problems, that the matter be started *de novo* in such a manner as not to cloud the hearing itself.

[20] I do not think it is a case where any party should be punished with a costs order so no costs order is granted.

[21] The matter is accordingly referred to the second respondent for a *de novo* arbitration hearing.

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JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE CELE
ON 26 JUNE 2007

ON BEHALF OF THE APPLICANT: IN PERSON(?)

ON BEHALF OF THE 1st RESPONDENT: MS C NEL(?)

EXTRACT
Judgment delivered on 26 June 2007

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