

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

CASE NO JR 1266/08

In the matter between:

GAGE SPECIALISTS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER MATTHEWS RAMOTSHELA

Second Respondent

SYLVESTER ZITHA

Third Respondent

JUDGMENT

COETZEE AJ:

Introduction

1. Applicant seeks to have an arbitration award awarding the Employee compensation reviewed and set aside on the basis that no evidence was presented to the Commissioner and that the Commissioner, therefore, could not have made any finding.

The facts

2. According to the arbitration award, the Commissioner repeatedly advised the Employer representative of a failure to present any oral evidence,

especially in the light of the Employee's denial of the allegations levelled against him.

3. The Employer stated repeatedly that it was not calling any witnesses to substantiate its allegations of fairness relying upon a bundle of documents it wished to present to the Commissioner.
4. While the arbitration award is silent on this issue, the Employer contends that its representatives wished to hand up a bundle of documents containing the records of the disciplinary enquiry, but that the Commissioner refused to accept the documentation without the Employer leading any oral evidence.
5. The Commissioner recorded that the Employee also did not present any evidence.
6. The Commissioner in the absence of evidence by the Employer and the Employee held the dismissal to be unfair both substantively and procedurally.
7. Applicant seeks to review the arbitration award on two basis:
 - 9.1 The Commissioner should have guided the parties to present evidence on oath, which he allegedly failed to do.
 - 9.2 The Commissioner could not make any award in the absence of any evidence.

Analysis

8. A Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities¹.

¹ Section 138(1) of the Labour Relations Act

9. A dismissal is unfair if the Employer fails to prove that the reason for dismissal is a fair reason (in this case relating to conduct) and that the dismissal was effected in accordance with a fair procedure².
10. The Commissioner may, therefore, once it is established that there was a dismissal conclude that the dismissal was unfair if the Employer has failed to lead evidence to prove a fair reason and a fair procedure.
11. The Employer did not present any evidence that it dismissed the Employee, and if so for what reason.
12. The Employee also did not give any evidence that he was dismissed.
13. There is no record of any agreement between the parties that the Employer had dismissed the Employee.
14. In the absence of any evidence the Commissioner could not conclude the fact of a dismissal.
15. The award is one that a reasonable Commissioner could not have made.

Order

16. The arbitration award in case number LP6863/07 dated 16 May 2008 is reviewed and set aside. The dispute between the parties is to be referred to arbitration before a Commissioner other than Second Respondent.

A J COETZEE
ACTING JUDGE OF THE LABOUR COURT

² Section 188(1) of the LRA

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| DATE OF HEARING: | 22 DECEMBER 2010 |
| DATE OF JUDGMENT: | 22 DECEMBER 2010 |
| APPEARANCES: FOR APPLICANT: | RIKI ANDERSON of Riki Anderson Attorneys |
| FOR THE RESPONDENT: | NO APPEARANCE |