

**IN THE LABOUR COURT OF SOTH AFRICA
HELD AT JOHANNESBURG**

Case no: JR718/04

In the matter between:

**DEPARTMENT OF TRANSPORT: LIMPOPO
PROVINCIAL GOVERNMENT**

Applicant

and

**GENERAL PUBLIC SECTORAL
BARGAINING COUNCIL
LUFUNO LAWRENCE RAMABULANA
DANNY DUMISANI NGOBENI**

First respondent

Second respondent

Third respondent

JUDGMENT

LEEUEW AJ

INTRODUCTION

[1] The applicant approached this court in terms of section 145 of the Labour Relations Act 66 of 1995 (“the LRA”) for an order in the following terms:

- “1. That, the First Respondent be called upon to show cause why the Arbitration Award dated the 09th January 2004 under Case No. PSGA 6183 made by the Second Respondent as Arbitrator, should not be reviewed and corrected, or set aside;
2. That, the First Respondent and/or Second Respondent be is hereby called upon to dispatch within Ten [10] days after receipt of the Notice of Motion, to the Registrar of the above Honourable Court, the record of the proceedings sought to be reviewed and corrected or set aside, together with such Reasons as are required by law or desirable to provide, and to notify the Applicant that this has been done;
3. That condonation for late filing of this application be granted.
4. Costs of this Application only if this is opposed”.

[2] The third respondent referred the matter to the first respondent for arbitration after conciliation had failed. A certificate of outcome was issued on 24 July 2003.

[3] The third respondent was employed by the applicant as a traffic officer. His duties were amongst others, to conduct tests on the candidates who wished to obtain or be issued with learners and/or drivers licences.

- [4] It is alleged that during the course of his employment and whilst executing his duties as a traffic officer, he inappropriately solicited sexual favours from three different women who had attended the applicant's offices for the purpose of being tested for a learners and /or drivers licence, in return for causing a licence to be issued to them without being tested therefor. The other two charges were withdrawn and the applicant proceeded with those charges wherein Ruth Maluleke was the complainant.
- [5] Six charges were preferred against him in that regard, including one of persuading Ruth Maluleke not to divulge the information to the officer investigating the charges against him.
- [6] A disciplinary hearing was held and the third respondent was convicted of all six counts and was consequently dismissed. He did not succeed on appeal and subsequently referred the dispute to the first respondent as stated in paragraph (2) above.
- [7] After the arbitration hearing, the second respondent set aside the disciplinary sanction imposed by the employer and ordered the reinstatement of the third respondent, as well as payment of his outstanding salary.

SUBMISSIONS

- [8] It is submitted by Counsel for the applicant, which issue appears in the applicant's founding affidavit, that there was no agreement between the parties that the arbitrator should confine himself to the question whether or not the third respondent was offered a demotion or dismissal before the commencement of the disciplinary proceedings or after. He was rather required to establish whether the dismissal was substantively and/or procedurally fair. It is for this reason that the applicant requests that the arbitration award be reviewed and set aside.
- [9] The third respondent submits that his dismissal was substantively and procedurally unfair in that the chairperson was biased against him. He further submits that the arbitrator did not commit any irregularity and urged this court not to interfere with his ruling.

ANALYSIS OF ISSUES

- [10] The transcribed record of the arbitration proceedings is incomplete in that the bulk of the witnesses' evidence was not transcribed. The chairperson of the internal disciplinary proceedings testified on behalf of the applicant. He summarised the evidence led by Ruth Maluleke, the complainant, with regard to the charges preferred against the third respondent. Her evidence was not transcribed and no reference was made to her testimony by the arbitrator in the award.

- [11] Although the arbitration record is incomprehensible, it is still possible to decide on the record available, as well as what is contained in the arbitration award itself. Counsel for the applicant urged me to rely on the arbitration award based on the fact that the irregularity is patent from the award to the extent that the record is not necessary in the circumstances. Reliance is placed on the **Shoprite Checkers Ltd v Commission for Conciliation and Arbitration & others** (2002) 23 ILJ 943 (LC). I agree with this submission.
- [12] The arbitrator, when the dispute was referred to him, was required to determine whether or not the third respondent's dismissal was substantively and/or procedurally unfair. This he failed to do. He concentrated on the issue whether or not the third respondent was given the option to accept demotion or be dismissed and came to the conclusion that the third respondent was dismissed without him being properly informed about the option to accept a demotion as an alternative to dismissal, and which according to the arbitrator was unfair and improper.
- [13] He went further to state that **“(It) is not because Ngobeni is entitled to an alternative but his entitlement is established as a result of the chairperson's findings, which was communicated to the Department or the respondent”**.
- [14] It is not clear from the arbitration award, whether the third respondent was still disputing the fact that his dismissal was substantively and procedurally unfair. I have already alluded to the

fact that the arbitrator did not deal with the merits of the case against the respondent in order to establish whether or not his dismissal was fair.

[15] I am of the view that the arbitrator committed a gross irregularity in conducting the proceedings. He also exceeded his powers and failed to apply his mind to the issues presented before him for the purpose of determining the fairness of the third respondent's dismissal.

[16] I accordingly make the following order:

- (i) The arbitration award dated 9 January 2004 under case no. PSGA 6183 made by the second respondent as arbitrator is hereby reviewed and set aside;
- (ii) The dispute is referred back to the first respondent to be heard by a commissioner other than the second respondent;
- (iii) There is no order as to costs.

M M LEEUW
Acting Judge of the Labour Court

APPEARANCES

For the applicant:	M G Phatudi
	(instructed by M G Phatudi Incorporated
For the respondent:	D D Ngobeni
	(in person)
Date of hearing:	19 October 2006
Date of judgment:	17 November 2006