IN THE LABOUR COURT OF SOUTH AFRICA

CASE NUMBER : J 450/99

In the matter between :

PARK HYATT HOTEL **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER M MATJANE **Second Respondent**

THE ENTERTAINMENT CATERING COMMERCIAL AND ALLIED WORKERS UNION OF SOUTH AFRICA **Third Respondent**

CHARLES MALOI **Fourth Respondent**

J U D G E M E N T

KENNEDY A J

[1] The Applicant seeks to have an award of the Second Respondent, a Commissioner of the CCMA dated 24 December

1998, reviewed and set aside in terms of section 145 of the Labour Relations Act No 66 of 1995.

[2] In the award, the Second Respondent ("***the Arbitrator***") found that the decision by the Applicant to dismiss the Fourth Respondent was unfair. He ordered the reinstatement of the Fourth Respondent with retrospective effect for a period specified in the award.

[3] The Applicant's original decision to dismiss the Fourth Respondent arose from an incident in which he had, in his capacity as a laundry assistant, cleaned a pair of valuable shoes belonging to one of the hotel guests in a manner which, it is common cause, rendered them unfit for use. He used a dark shade of shoe polish inappropriate for the light colour of the shoes, and also polished over the laces of the shoes, which were in the process ruined.

[4] The Arbitrator rightly accepted that the offence was not trivial, having regard to the financial loss occasioned by the Fourth Respondent's conduct and the anger and frustration of the hotel guest. The Arbitrator found further that the Fourth Respondent was not grossly negligent, that the Applicant should

have applied a lesser sanction, and that in the circumstances the sanction of dismissal was inappropriate. The Arbitrator also concluded that the dismissal was unfair from a procedural point of view, in that the Fourth Respondent had not been allowed to be represented at the disciplinary enquiry.

[5] When regard is had to the evidence before this Court of what was presented before the Arbitrator during the arbitration proceedings, a number of serious concerns arise as to the Arbitrator's approach to the material before him. Of particular concern is his apparent disregard for and his failure to deal in any meaningful way with evidence which was presented on the Applicant's behalf to the effect that the Fourth Respondent had been counselled on a number of occasions concerning his poor performance and that he had been given a final warning for similar past poor performance. The Arbitrator appears to have misconstrued the nature of the charge of which the Fourth Respondent had been found guilty and for which he had been dismissed during the disciplinary enquiry. That charge was not, as the Arbitrator appears to have assumed, gross negligence, but poor performance. He appears to have disregarded the uncontradicted evidence presented to the arbitration to the effect that the employer applied particularly high standards

which it justified in the context of its need to provide a top quality service as a high grade hotel serving the needs of demanding guests. It cannot afford to have employees who are guilty of repeated poor performance. In my view there is considerable merit to the submission made by Mr Woodhouse, the Applicant's attorney who argued the matter on its behalf before me, that the Arbitrator appears to have considered the offence effectively "***in a vacuum and in isolation***".

[6] Similarly, the Arbitrator appears not to have applied his mind properly to the issue of procedural fairness. He accepted the version of the Fourth Respondent that he had been refused his request to be allowed representation at the disciplinary enquiry. The Arbitrator does not deal in any meaningful way with the clear evidence of Ms Moruwe, who testified on behalf of the Applicant, that she had been present at the disciplinary enquiry, that the Fourth Respondent had specifically been offered the opportunity to be represented and that he had elected not to be represented. The Arbitrator failed to deal with this evidence and in particular failed to show any process by which the completion versions were assessed particularly in relation to their credibility and the weight to be attached to the competing versions, and he fails to give any

reason why the Fourth Respondent's version should be accepted while that of Ms Moruwe should be rejected.

[7] The relevant test to be applied in reviews of Commissioners' awards under the Labour Relations Act is one of substantive rationality or "***justifiability***". This requires that there must be "***a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at. Carephone (Pty) Limited v Marcus N.O and Others (1998) 19 ILJ 1425 (LAC) at 1435 D - F.***"

As stated by Pretorius A J in **Abdull and Another v Cloete N.O and Others [1998] 3 BLLR 264 (LC) at 270 I**:

"***The Arbitrator is obliged to resolve apparent contradictions which is essential to his decision and reasons and to make findings thereon. These findings must be reasoned findings.***"

[8] In my view the approach of the Arbitrator in the present matter fails to satisfy this test. For the reasons set out

above, I conclude that the Arbitrator failed to apply his mind properly and reasonably to the matter. The decision cannot be said to be one which is reasonably justifiable. Accordingly the award falls to be reviewed and set aside.

[9] Mr Woodhouse urged that I should substitute my own finding for that of the Arbitrator, rather than remitting it to the Commission for Conciliation, Mediation and Arbitration for a fresh hearing before another Commissioner. In my view, this would not be appropriate, particularly where factual issues require to be determined on the basis of a proper assessment of the credibility of the various witnesses. That would require the benefit of ***vivo voce*** evidence, and also a proper assessment of the nuances and complexities related to what would be an appropriate punishment for the misconduct which was admitted by the Fourth Respondent. In my view, the most appropriate way of dealing with this would be for another Commissioner to hear evidence and argument.

[10] In the result I make the following order:

(a) The arbitration award of Commissioner M Matjane dated 24 December 1998 in CCMA case number GA 37301 is

hereby reviewed and set aside.

(b) The matter is remitted to the Commission for Conciliation, Mediation and Arbitration for a fresh arbitration hearing to take place before a Commissioner other than the Second Respondent.

(c) There is no order as to costs.

PAUL KENNEDY
ACTING JUDGE OF THE
LABOUR COURT
20 AUGUST 1999