IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR1605/05

In the matter between:

KAREN BEEF (PTY) LTD	**First Applicant**
And	
BONISWA BOVANE N.O	**1ST Applicant**
CCMA	**2nd Respondent**
South African Commercial	
Catering Allied Workers Union	
OBO MATHE	3**RD Respondent**

JUDGMENT

MOLAHLEHI J
Introduction

1] This is an application in terms of s145 of the Labour Relations Act 65 of 1995 (the LRA) in terms of which the applicant seeks to review and set aside the arbitration award issued by the first respondent (the commissioner) under case number MP5909-04 and dated 08 May 2005. In terms of this award the commissioner found the dismissal of the third respondent, Mr Mathe to be both substantively and procedurally unfair.

2] The review application was opposed by the South African

Chemical Catering and Allied Workers Union (SACCAWU) acting on behalf of Mathe.

Background

3] Prior to his dismissal, Mathe was employed as a driver responsible for delivering meat products to the applicant's clients.

4] The applicant dismissed Mathe for being drunk on duty on 6 October 2004. At the time of his dismissal he was on a final written warning for the same offence.

5] The version of Mathe during the arbitration hearing was that, on arrival at the applicant's premises on 20 September 2004, he was informed by the security officers that the britalizer machine was not "in commission" that day. He then proceeded to clog in and finalised the loading of his truck.

6] According to him at about 09:37 he proceeded to the gate with his truck and the delivery invoices. When he arrived at the gate he found that the britaliser machine was in good condition and working. He was then required to blow into the machine and the results thereof were positive. He was then informed by the security

officers to change into his civilian clothes and go home.

7] After changing into his civilian clothes on his way back from the change room he met with a certain Jack who advised him to take the second test. They both approached the security officer who agreed to conduct the second test, the results of which were negative.

8] Mathe then phoned Mr Scheiker the manager to inform him about the negative results of the second test. Scheiker responded by informing him that he should go home and that he (Scheiker) would be chairing his disciplinary hearing. What then followed thereafter was a disciplinary hearing against Mathe.

9] Scheiker, the chairperson of the disciplinary hearing testified for and on behalf of the applicant that Mathe attempted to evade the alcohol test on the day in question. He further testified that the level of alcohol which was found in Mathe was 0.011% which was in excess of the statutory limit for truck drivers which is 0.002%.

10]The second witness of the applicant Mr Jan Mofokeng the security officer, testified that the britaliser machine he used to conduct the

test on Mathe on the day in question is calibrated every six month and on that day it was unlikely that it was not functioning properly. He further testified that Mathe attempted to bypass the britaliser test when reporting for work but was compelled to take the test when he presented his papers for the security check before departing with his loaded truck.

Grounds for review

11]The applicant contended that the conclusion of the commissioner that the dismissal was both procedurally and substantively unfair was not reasonable and justifiable based on the evidence properly before her and that in this regard the commissioner committed a number of irregularities in analysing the evidence placed before her.

12]In as far as procedural unfairness is concerned the commissioner found that Mathe's dismissal was unfair because the chairperson of the disciplinary hearing was biased. This conclusion is based on the finding by the commissioner that the chairperson conceded that when Mathe approached him concerning the alcohol test he refused to speak to him and told him to go home because he would be

chairing his disciplinary hearing. The commissioner found in this regard that the chairperson of the disciplinary hearing had prior information regarding the allegations labelled against, Mathe and was therefore biased.

13]This conclusion, the applicant argued, constitutes a gross irregularity because the commissioner misconstrued the test for bias.

14]The relevant legal principles governing the concept of bias received attention in the appellate division case of **BTR Industries SA (Pty) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673 (A)**. In dealing with the definition of the word "bias" the AD quoted with approval what was by the house of Lords in the case of **Franklin v Minister of Town and Country Planning 1948 AD 87 (HL) at 103m,** where it was held that the proper significance of the word "bias" means:

> *"… to denote a departure from the standard of even – handed justice which the law requires from those who occupies judicial office or those who are commonly*

regarded as holding a quasi-judicial office …".

15]Of significance in the determination of the issue before this court was the determination of the test to be applied by the commissioner, in assessing the existence of bias as claimed by Mathe. In this regard Hoester JA held at 693 para I-J in BTR Industries that:

> "… I conclude that in our law the existence of a reasonable suspicion of bias satisfy the test: and that an apprehension of a real likelihood that the decision maker is biased is not a prerequisite for disqualifying bias".

16]Earlier on in the judgment the court had quoted with approval what was said by full bench of the Cape Provincial Division per Conradie J at 880 E-G in the case of **Monnig and Others v Council of Review and others 1989 (4) SA 866 (C),** where the learned Judge said:

> "Since the appearance of impartiality have to do with the public perception of the administration of justice, it is only to be accepted that some tribunals will be more vulnerable to suspicion of bias than the other. The most vulnerable, I

ventured to suggest, our tribunal- other than the courts of law- which have all the attributes and are expected by the public to have exactly as a court of law does".

17]The view expressed by Conradie J in the above quotation was expressed in the context of a court martial. The same view was expressed by the Labour Appeal Court in the case of **Anglo American Farms t/a Boschendal Restaurant v Komjwao (1992) 13 ILJ 573 (LAC) at para [583].** In that case the Court quoted with approval Cameron in an article entitled "The Right to a Hearing before Dismissal Part 1" (1986) 7 ILJ 183 at 2132 where the learned author said:

> " While allowance will be made for the unavoidable practicalities of prior contract, personnel impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective and fair judgment to been on the issues involved- such as bias or presumed bias stemming from a closed or prejudiced mind or family or other relationship will render the

procedure unfair. The importance of appearances in this area must not be left out of account and it is admitted that where an employee has a reasonable basis for believing that something more than merely the traces of unavoidable left by prior contact in the employment relationship is present and this precludes a fair hearing, a complaint on the grounds of bias should be upheld".

18]The learned author went further to say:

"In the employment context the full rigour of the law as it has developed in relation to statutory or domestic tribunals is not applied. The person or person's deciding on guilt or innocence and on the appropriate penalty will in many cases know the accused employee (including past history, employment record, previous warning) and may have even termed some initial impression as to the event in issue".

[19] It is clear that the complaint of bias that the Mathe relied on in this matter is founded on the response that the chairperson of the disciplinary hearing gave him when he (Mathe) sought to speak to

him about the britaliser test. The chairperson refused to speak to him as he indicated that he would be chairing the disciplinary hearing.

[20] It is apparent that the commissioner based her determination of bias on the subjective submission by Mathe and not on the objective assessment of the evidence before her. In fact even on Mathe's own version, the evidence was in my view insufficient to arrive at a conclusion that the chairperson of the hearing was bias. In this regard it is also my view that the commissioner's conclusion is unsupported by the evidence or the evidence before her was insufficient to support the conclusion she reached.

[21] I align myself to the decision in the unreported case of Sil Farming CC t/a Wigwan v CCMA (JR 3347/2005), where Van Niekerk AJ held:

> "[16] A commissioner arrives at a decision which no reasonable decision maker could reach if the decision is unsupported by any evidence, or by evidence that is insufficient to reasonably justified a decision arrived at or where the decision maker ignores award

uncontradicted evidence".

[22] In the present case, the evidence of Mathe goes no further than allege that when he contacted the chairperson with the view to discussing with him the britaliser test, the chairperson informed him, that he would be chairing the disciplinary hearing arising from the allegation of him having being drunk at work. It is from this acknowledgment by the chairperson that the commissioner drew the conclusion that the chairperson of the disciplinary hearing was biased.

[23] The commissioner ignored in her assessment the reason given by the chairperson of the disciplinary hearing that he did not want to speak to Mathe as he knew he would be chairing the disciplinary hearing. Had the commissioner applied her mind she would have found that by refusing to speak to Mathe about this matter the chairperson of the disciplinary hearing was seeking to eliminate any apprehension of bias from either of the parties.

[24] Except for the above evidence there was no other evidence that suggested that the chairperson of the disciplinary hearing was privy

to other details regarding the merits of the case. Thus the conclusion by the commissioner that the chairperson of the disciplinary hearing was bias because he was privy to the merits of the case is nothing but speculation on the part of the commissioner.

[25] The other piece of evidence which the commissioner ought to have taken into account in assessing whether or not the chairperson of the disciplinary hearing was biased is the fact that Mathe who had been represented by Mr Sithole of SACCAWU never raised an objection or complaint at the disciplinary hearing that the chairperson was biased because he had prior knowledge of the case. There was also no application for the recusal of the chairperson for the same reason.

[26] Speculation on an issue by a commissioner is enjoined to determine that issue, is in my view indicative of the commissioner failing to perform his or her duties as required by the Labour Relations Act. Thus had the commissioner appreciated the task before her, she would have realised that the test for biased was an objective test and that there was insufficient evidence to come to the conclusion that Mathe had a reasonable apprehension of bias.

The commissioner would have further found that Mathe had a fair hearing because the chairperson was open- minded and impartial.

[27] The second ground upon which the applicant relied on in challenging the conclusion of the commissioner is based on the finding that the second britaliser test produced a negative result.

[28] The commissioner's conclusion was based on the evidence of the two security officers who testified during the disciplinary hearing and not at the arbitration hearing. The commissioner relied on their evidence as contained in the transcript of the disciplinary hearing which was presented at the arbitration hearing. The two security officers never testified before the commissioner.

[29] The two security officers had testified at the disciplinary hearing that there were two tests conducted on the day in question. They confirmed that the first test was positive and the second negative. A print out was produced for the first and not for the second test. The commissioner after considering the evidence of the two security officers in the absence of a print out for the alleged second test concluded as follows:

"Mr Scheiker conceded that there were two security officers who, during the disciplinary hearing testified that there was indeed a second test that was conducted and the results were negative. He stated that he did not attach much weight to the testimony as there was no documentary proof to this effect. Mr Mathe correctly responded to the question regarding the outcome of the print out of the second test that it was not his responsibility/job description to ensure that the print out is done by the security officers. The record of the disciplinary hearing show that there was no reason advanced by the security officers for failure to print the result. There was no reason given by the respondent party why would the custodian of the alcohol policy give a false testimony during the enquiry. Save to ask for a print out to that effect their evidence was also not challenged".

[30] It is evidently clear from the above quotation that the commissioner was influenced and placed emphasis on the evidence of two security officers who as indicated earlier on testified during the disciplinary hearing but not at the arbitration hearing. The commissioner was also influenced in her decision by the fact that

no print out of the second test was produced at the hearing. The commissioner in this regard found that the chairperson failed to attach weight to this evidence. In this regard the commissioner placed the onus to explain the absence of the print out of the second test on the applicant despite the fact that it was Mathe who alleged the existence thereof.

[31] In my view, in arriving at this conclusion the commissioner failed to apply, in a fundamental way the rules of evidence and thereby denying the applicant a fair hearing.

[32] The case of the applicant in seeking to discharge its onus in showing that the dismissal was fair was founded on the evidence that only one test was conducted. The case of Mathe on the other hand was that there were two test conducted. The second test according to him was conducted on his return from the change room. There is no evidence as to the time spent in the change room by Mr Mathe after undertaking the first test. There is also no evidence by Mr Mathe explaining why there was no print out of the second test.

[33] In relation to the print out of the alleged second test the chairperson of the disciplinary hearing testified during cross examination that

he enquired from Mathe whether he did ask for the print out and his answer was in the negative. The assessment by the commissioner would have been sustainable had there been evidence before her that Mathe, requested the disclosure of the print out of the second test (if at all this test was ever done), and was refused.

[34] The commissioner also accepted the evidence that the second test was done based on the transcript of the disciplinary hearing. The commissioner accepted this evidence despite the fact that the two security officers who testified during the disciplinary hearing did not testified before her and there was no evidence that the parties had agreed that the record of the disciplinary hearing would serve as evidence at the arbitration hearing.

[35] It is therefore my view that the conclusion by the commissioner that the second test was done was unreasonable because she arrived at this conclusion on the evidence which was not properly before her. There was also no explanation given by Mathe why he failed the first test and why he passed the second test. And more importantly the commissioner does not explain why she

disregarded the evidence of the first britaliser test which constituted evidence properly placed before her and which was common cause.

[36] In the circumstances of this case I am of the view that the dismissal of Mathe was both substantively and procedurally fair.

[37] The dictates of law and fairness do not require that cost order be issued.

[38] For the above reasons, the commissioner's award stand to be reviewed and set aside. In my view there is no point in remitting this matter back to the CCMA as there is sufficient information upon which this court can determine the matter. I according make the following order:

1. The first respondent's award issued under case number MT 5909-04 and dated 29 April 2005 is reviewed and set aside.
2. The award of the commissioner is substituted with the following award:
   (a) "The dismissal of Mr Mathe is both substantively and procedurally fair"
3. There is no order as to costs.

MOLAHLEHI J

DATE OF HEARING **:** 06 DECEMBER 2007

DATE OF JUDGMENT : APRIL 2008

Appearances

For the Applicant : DEON MASHER

Instructed by : BELL DE WAR & HALL ATTORNEYS
For the Respondent: SACCAWU (Union Official)
Instructed by : SACCAWU