

| Sneller Verbatim/HVDM

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR170/01

2002-12-11

In the matter between

MAGNUM SECURITY (PTY) LTIMITED

Applicant

and

PETRUS THOBEJANE

1<sup>ST</sup> Respondent

M J RALEFATANE N.O.

2<sup>ND</sup> Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

3<sup>RD</sup> Respondent

---

J U D G M E N T

---

REVELAS J:

1. The first respondent was dismissed by the applicant pursuant to a disciplinary inquiry where he was found guilty of certain misconduct. The first respondent then referred a dispute about an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), where the second respondent arbitrated the matter under the auspices of the CCMA

and made an award in favour of the first respondent, finding that the dismissal was unfair.

2. The applicant has brought an application to review this arbitration award in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") and have it set aside.
3. There are several grounds upon which the applicant brought this application for review. However, this award falls to be set on the first ground and it is not necessary to consider any of the other grounds.
4. What the second respondent had done, is to accept the evidence of a witness (as reliable), who did not testify under oath. He disbelieved a witness who did testify on oath. In the matter of *Morningside Farms v Van Staden No and another* [1998] BLLR 488 LC, this Court held that an arbitrator who does not hear evidence of any party under oath commits a gross irregularity. It may have been that the Labour Court went too far in that case and applied a test which is too strict, but in a further case, Landman J held that arbitrators are entitled to conduct proceedings within their own discretion. However, conduct such as under consideration in this judgment, where some witnesses do testify under oath and some do not, and where unequal weight is given to their testimonies, does amount to an irregularity. Landman J described it as "legal misconduct" and said it amounted to a

defect contemplated in S145 of the Act (See: *Mthembu & Mahomed Attorneys v CCMA and others* (1998) 19 ILJ 144 (LC) at 148 A-C).

5. In these circumstances alone, the award ought to be set aside and is referred back to the CCMA to be arbitrated by a different commissioner.
6. In the circumstances it is ordered that:
  1. The award of the second respondent is set aside.
  2. The dispute is referred back to the Commission of Conciliation, Mediation and Arbitration for arbitration.

---

E. Revelas

ON BEHALF OF APPLICANT:

Mr. C Beckenstrater from  
MOODIE & ROBERTSON

ON BEHALF OF RESPONDENT: MOSEGOMI ATTORNYS. c/o

LEGODI Attorneys.