SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL

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Case number: RPNT 997

In the Arbitration between:

Itumele Buslines (Pty) Ltd. t/a Interstate Buslines **Applicant party**

and

South African Transport and Allied Workers Union (SATAWU)

1st Respondent party

Transport and Allied Workers Union (TAWUSA)

2nd Respondent party

Union/Employee's representative: Mrs. Bloem
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Employer's representative: Mr. Mataboge
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ADVISORY ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION:

1.1 A Conciliation hearing was scheduled for the 15th of September 2011 at the Offices of Interstate Buslines, 246 Church Street, Hamilton, Bloemfontein.

1.2 The Applicant, Itumele Buslines (Pty) Ltd. t/a Interstate Buslines, was represented by Mrs. Bloem, Legal Representative from Spangenberg, Zietsman & Bloem Attorneys.

1.3 Both the Respondents, SATAWU and TAWUSA, were represented by Mr. Mataboge, an Official from SATAWU.

2. ISSUE IN DISPUTE:

2.1 Although the matter was set down for a Conciliation hearing, for a dispute in terms of Section 64 (1), 134 Mutual Interest Disputes, the parties requested me to issue an Advisory Arbitration Award. The dispute in essence relates to a provision of the Employer's Disciplinary Code and Procedure.

3. BACKGROUND OF THE DISPUTE:

3.1 The Applicant and the Respondents commenced with consultations regarding the Employer's Disciplinary Procedure during 2009. Subsequently to these consultations, the Applicant implemented the Disciplinary Procedure as consulted. Due to the fact that the Respondents raised various concerns after the implementation of the Disciplinary Procedure, the parties agreed to review the Disciplinary Procedure and commenced with consultation in August 2011.

3.2 The parties were in agreement on all the provisions of the disciplinary procedure except for 1 (ONE) particular clause pertaining to the appointment of chairpersons to chair disciplinary hearings in the Company.

3.3 The Applicant's stance is that it is its sole prerogative to decide whom to appoint to chair a disciplinary enquiry, whether such person is an employee of the Company or not. The Applicant's point of view is that it may utilize the services of external chairpersons for all disciplinary enquiries if it so wishes.

3.4 The Respondents' stance is that they are entitled to be consulted before a person who is not employed by the Company, is appointed to chair a disciplinary hearing.

3.5 The parties are therefore in dispute and request the Commissioner to assist in resolving the dispute by means of an Advisory Arbitration Award as set out in the terms of reference.

3.6 The terms of reference reads as follows:

"The Commissioner is hereby requested by the parties to decide on the following:

1. *Whether the Applicant is entitled in law to appoint suitably qualified persons not employed by the Company, to chair internal disciplinary hearings;*

2. *Whether the Applicant is required by law to consult with the Respondent prior to the appointment of any chairperson to a disciplinary hearing."*

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1 SUBMISSIONS ON BEHALF OF THE APPLICANT:

4.1.1 ***Mrs. Bloem*** held that the Respondents are disputing the Applicant's right and sole prerogative to appoint suitably qualified persons to chair internal disciplinary hearings and the parties have agreed to abide by the Commissioner's finding and Advisory Arbitration Award on the following questions:

"1. Whether the Applicant is entitled by law to appoint suitably qualified persons not employed by the Company, to chair internal disciplinary hearings;

2. Whether the Applicant is required by law to consult with the Respondents prior to the appointment of any chairpersons to chair disciplinary hearings."

4.1.2 She argued that Schedule 8- The Code of Good Practice: Dismissal of the Labour Relations Act, 66 of 1995, determines that all employers should adopt disciplinary rules that establishes the standard of conduct required of their employees, the form and content of which will vary according to the size and the nature of the employer's business. The rules are intended to create certainty and consistency in the application of discipline.

4.1.3 She held that being a large employer who employs more than 500 (FIVE HUNDRED) employees, and schedules more or less 40 (FORTY) disciplinary hearings per month, the Applicant has to have rules that are clear and understood by everybody in order to ensure employment justice and efficient operation of the business.

4.1.4 Mrs. Bloem argued that due to the importance of the abovementioned, the Applicant is consulting with the Respondent on amending certain provisions of their Disciplinary Procedures. She stated that although it is trite law that discipline is management's prerogative, the Applicant values the opinion of the Respondents and wishes to have a final document which is clear and fair according to management as well as the Respondents representing the employees of the Applicant.

4.1.5 She argued that notwithstanding the above, it is further necessary and of the utmost

importance that the provisions of the disciplinary procedure are not so rigid and time consuming that it eventually restricts management disciplinary authority and thereby adversely affecting the business and operation of the Applicant.

4.1.6 Mrs. Bloem held that it is in this regard that the Applicant is refusing the Respondents' insistence that they be consulted in the appointment of chairpersons for disciplinary hearings and claims to have a sole prerogative in the appointment of suitably qualified persons to chair internal hearings, whether such persons are employed by the Company or not.

4.1.7 She held that the Respondents have indicated that they would be satisfied with a determination in the disciplinary procedure that they have to be consulted when the Applicant intends to appoint chairpersons not employed by the Company, because they do not agree that the appointment of an external chairperson would constitute fair procedure.

4.1.8 Mrs. Bloem argued that the requirements of fair procedure derives from the law of natural justice of which the following 2 (TWO) rules are important:

"1. Proceedings should be conducted so that they are fair to all the parties - expressed in the Latin maxim *audi alteram partem* (let the other side be heard); and

2. A person who makes a decision should be unbiased and act in good faith. He or she therefore can not be one of the parties in the case, or have an interest in the outcome. This is expressed in the Latin maxim *nemo iudex in causa sua* (no man is permitted to be judged in his own case)."

4.1.9 She argued that it is particularly the second of the 2 (TWO) above rules which pertain to the matter and will be dealt with in order to substantiate the Applicant's argument. She referred to John Grogan and quoted the following:

"Like any judicial or quasi-judicial proceedings, the purpose of disciplinary inquiries is to enable presiding officers to weigh up the evidence for and against accused employees and to make informed and considered decisions in regard to the employee's guilt and, if necessary, on the appropriate sanction. This presupposes that presiding officers should keep open minds until the conclusion of the proceedings. They must, in short, refrain from showing bias or even giving the impression of bias, until they have given their final decision. The principle that a presiding officer must be even-handed does not give employees the right to have a hand in choice of presiding officer; that remains the employer's prerogative. If a presiding officer at a disciplinary inquiry exhibits bias, or gives the accused employee the impression of being biased, the proceedings are regarded as unfair even if the ultimate decision reached is factually and legally impeccable. On the other hand, an incorrect decision is not necessarily an indication that the presiding officer was biased."

4.1.10 She held that in the matter of *Moodley v Knysna Municipality & another (2007) 28 ILJ 1715 (C)* the Applicant, a senior employee of the 1st Respondent Municipality, had obtained an urgent interdict preventing the Municipality from proceeding with disciplinary proceedings against him to enable him to take the appointment of the presiding officer on review. The Applicant contended that he had the right arising from his employment contract and administrative law, to the application of the rules of natural justice and fair procedure in appointment of a presiding officer and in particular the right to be heard on the suitability of the presiding officer. The Court found that it remained the sole prerogative of the municipality to appoint a suitably qualified presiding officer in disciplinary matters. The Court accordingly dismissed the Application with costs.

4.1.11 She further held that in the matter of *Khula Enterprise Finance Ltd. v Madidane & others (2004) 25 ILJ 535 (LC)* Madidane attacked the procedural fairness of the disciplinary process. He contended that the appointment of an external chairperson was a breach of the Applicant's disciplinary procedures and that he perceives the

chairperson to be biased. The Disciplinary Code of the Applicant provided that "an appropriate level of manager acceptable to both parties shall chair the hearing". The Court found that the Code served merely as a guideline and that the Employer was entitled to look outside the organization for somebody with appropriate expertise and objectivity to chair the enquiry and that this served the interest of both side receiving a fair hearing. The Court further found that his reliance on the provisions of the code was misplaced and that it did not provide that an employee had to approve of the appointment of any person to chair the disciplinary enquiry.

4.1.12 In the matter of *Mashiya v Sirkhot NO and 2 others (J1744/11)* the Applicant brought an urgent Application requesting an Order that the chairperson of a disciplinary hearing must recuse himself from the hearing and an interdict against the Respondent from proceeding with the hearing under the chairmanship of the 1st Respondent. The Applicant sought an Order that the Respondents must agree to another independently appointed Arbitrator from the relevant Bargaining Council. The Applicant submitted that he had a clear right to the relief sought. The right he asserted was the right of a fair trial. He submitted that, absent the relief sought, he would be denied the right as a chairperson was biased and refused to recuse himself. The Court found that it seems that the Department went out of its way to appoint an independent outsider to chair the hearing rather than appointing a fellow employee who may be familiar with the Applicant. Of more importance is that the Court found that possible harm would not be irreparable and that even if the dismissal was not for a fair reason or fair procedure, he could claim unfair dismissal at the CCMA or relevant Bargaining Council.

4.1.13 Mrs. Bloem argued that the question which must therefore be considered is whether any harm would come from the Company appointing the chairperson who is suitably qualified but not employed by the Company. The further question is whether there is any apprehension of irreparable harm.

4.1.14 She argued that interference with their right to appoint chairpersons in disciplinary hearings would also not be in the interest of expeditious dispute resolution which

would rather lead to procedural unfairness.

4.1.15 She held that the Applicant is fully aware of what is at stake, should procedural defects transpire during disciplinary hearings and would not risk appointing any chairperson who is not suitably qualified or of whom there may be a reasonable apprehension of bias.

4.1.16 She argued that the Applicant and the Respondents are therefore apparently ad idem that fair procedures must be followed and that chairpersons must be impartial to ensure the right of the accused employees. She stated that the parties further agree that if fair procedures are not followed, the Applicant will be held liable to pay compensation to the aggrieved employee.

4.1.17 She held that managing discipline is therefore not only the Applicant's prerogative, but also their responsibility. She stated that if the Respondents representing the employees of the Applicant have a reasonable apprehension of bias, they may apply that the chairperson recuse themselves and refer the matter to the Bargaining Council for adjudication.

4.1.18 She stated that should the Respondents insist on interfering with management prerogative to manage discipline, then it would also be justified to expect shared responsibility. If the Applicant accepts responsibility for the procedure followed by the chairpersons they appoint, then this responsibility must be shared by the Respondents if the Commissioner should find that the Respondents be consulted prior to the appointment of a chairperson.

4.2 SUBMISSIONS ON BEHALF OF THE RESPONDENT:

4.2.1 ***Mr. Mataboge*** argued that they are of the opinion that the new Disciplinary Code should contain a definition of an external chairperson. He argued that it is their proposal that if they have a definition of an external chairperson, this would mean any

person employed by an independent institution and not receiving any remuneration from Interstate Buslines.

4.2.2 He stated that on these grounds, management said that they will not agree to this, and the issue of the external chairperson has not been taken care of.

4.2.3 He stated that during the consultations with Gert van Heerden, the only snag or bone of contention was regarding the appointment of an external chairperson on a full time basis. He held that over and above that they want the person to have a space of office at Interstate Buslines, they stated that this is tantamount to a full time employee. He argued that this will not be good as the person will be befriending many employees in the Company and this can compromise their cases.

4.2.4 He argued that he knows that there will be exceptions in that there is a backlog of cases in the Company. He stated that if there was for example 20 (TWENTY) cases that have not been attended to, then they can agree to an external chairperson to be appointed on a full time basis for that specific backlog.

4.2.5 He argued that the Employer should agree that the line manager must be the chairperson, and the only time when they are not allowed to deal with the case is when they are implicated. He argued that in that case they can inform the Employer that they do not think that the line manager must act, and vice versa as well.

4.2.6 He held that in such cases the Company must say to the organized labour that they must look for an external chairperson. On those grounds there will be no problem as long as they have been informed of that. Hence their request for notification of the external chairperson. He held that they want to be consulted on the appointment of an external chairperson, not an internal chairperson.

4.2.7 He held that the Applicant raised an issue of biasness of the chairperson and this is the issues that can be challenged by labour, should this be in a formal hearing, and

that they are aware of that.

4.2.8 Mr. Mataboge held that there should be proper consultation and reasoning why certain persons must be appointed. He held that they want to see management dealing with the hearings internally.

4.2.9 He stated that they have read all the case law cited and that many of these cases refer to something else as to what they are saying. He held that they are saying that they need to be consulted as organized labour and that they do not want to see external persons being here on a full time basis, only when required.

5. ANALYSIS OF ARGUMENTS & EVIDENCE:

5.1 I have been requested by the parties to decide on the following:

5.1.1 Whether the Applicant, (Employer) is entitled in law to appoint suitably qualified persons not employed by the Company, to chair disciplinary hearings;

5.1.2 Whether the Applicant is required by law to consult with the Respondent prior to the appointment of any chairperson to chair a disciplinary hearing.

5.2 <u>Whether the Applicant, (Employer) is entitled in law to appoint suitably qualified persons not employed by the company, to chair disciplinary hearings;</u>

5.2.1 I have considered the provisions of Schedule 8: Subsection 3. Disciplinary measures short of dismissal. No mention is made as to who should and or may chair a disciplinary hearing.

5.2.2 In the matter of *Khula Enterprise Finance Ltd v Madidane & others (2004) 25 ILJ 535 (LC)*, the Court found that the Code served merely as a guideline and that the employer was entitled to look outside the organization for somebody with appropriate

expertise and objectivity to chair the inquiry and that this served the interests of both sides receiving a fair hearing.

5.2.3 In the matter of *Mashiya v Sirkhot NO and 2 Others (J1744/11)* the Court found that it deemed that the Department went out of its way to appoint an independent outsider to chair the hearing rather than appointing a fellow employee who may be familiar with the applicant. Of more importance is that the Court found that the possible harm would not be irreparable and that even if the dismissal was not for a fair reason or fair procedure, he could claim unfair dismissal at the CCMA or relevant Bargaining Council.

5.2.4 Having considered the abovementioned, I am satisfied that the Applicant is entitled in law to appoint suitably qualified external chairpersons, to chair internal disciplinary hearings. There is no prescription in law that disqualifies an employer from appointing an external chairperson. There are many instances where it would be to the benefit of an accused employee to rather have an independent external chairperson, than an internal chairperson who has knowledge of the matter.

5.3 <u>Whether the Applicant is required by law to consult with the Respondent prior to the appointment of any chairperson to chair a disciplinary hearing.</u>

5.3.1 Grogan (Dismissal 2010) p 240 states the following on this point:

"The principle that a presiding officer must be even-handed does not give employees the right to have a hand in choice of presiding officer; that remains the employer's prerogative."

5.3.2 In the matter of *Moodley v Knysna Municipality & another (2007) 28 ILJ 1715 (c)* the Court found that it remained the sole prerogative of the municipality to appoint a suitably qualified presiding officer in disciplinary matters.

5.3.3 Having considered the abovementioned, I find that the Applicant is not required by law to consult with the Respondents prior to the appointment of any chairperson to chair a disciplinary hearing. I am satisfied that the appointment of a suitably qualified presiding officer remains the sole prerogative of the Employer.

6. AWARD:

6.1 The Applicant is entitled in law to appoint suitably qualified persons not employed by the Company to chair disciplinary hearings.

6.2 The Applicant is not required by law to consult with the Respondents prior to the appointment of any chairperson to chair a disciplinary hearing.

Signed and dated at Bloemfontein on the 28th of September 2011.

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SARPBAC Panelist: C L DICKENS