NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 50574/12

29/10/2013

In the matter between:

POTGIETER ANTON DANIEL	FIRST APPLICANT
HERBST JAMES CHARLES	SECOND APPLICANT

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

29/10/2013 .....

AND

HOWIE CT NO	FIRST RESPONDENT
PEMA JD NO	SECOND RESPONDENT
BROOKING DL NO	THIRD RESPONDENT
JOHANNESBURG SECURITIES EXCHANGE LIMITED	FOUTH RESPONDENT

JUDGMENT

BAQWA J

Summary

This is an appeal from a decision of the Johannesburg Stock Exchange in terms of which the appellants had been fined five million rands each for contravening the JSE Listing Requirements.

The appeal to a Board set up in terms of the Financial Services Board Act was upheld. The JSE decision was set aside. The Appeal Board thereafter substituted its own decision finding the appellants to be in contravention of the Listing Requirement and imposing a fine of three million rands on each of the appellants.

The issue

Whether the Board had acted ultra vires in that section 26B(15) OF THE Financial Services Board Act 9 of 1990 does not provide a power "to substitute"' the Board's own decision.

[1] This is an application to review a decision of an Appeal Board constituted to hear an appeal by the applicants against two decisions made by the fourth respondent (the JSE). The Board was established in terms of section 26 of the Financial Services Board Act number 97 of 1999 ("the FSB Act").

[2] The applicants seek to review and set aside the decision in paragraphs 3 and 4 of the awards of the Appeal Board. These relate to the sale by applicants of certain single stock future contracts ("The SSFs") to Watermark Securities which in turn on-sold the SSFs to Huge Group Limited.

[3] The first respondent was the Chairman of the Appeal Board, the other members of which were the second and third respondents. The members of the Appeal Board do not oppose the application for review whilst the fourth respondent opposes the review.

The law

[4] The Appeal Board is established under section 26B of the FSB Act and its authority is set out in section 26B(15) of the Act which provides:

"The Appeal Board may-

(a) Confirm, set aside or vary the decision under appeal, and order that any such decision of the Appeal Board be given effect to; or

(b) Remit the matter for reconsideration by the decision maker concerned in accordance with such directions, if any, as the Appeal Board may determine."

In considering the actions of or the decisions of the board **in casu** the Board's considerations or deliberations have to be weighed within the parameters set within the statute.

[5] This action arises out of the alleged contravention of the Johannesburg Stock Exchange Listing Requirements relating to Single Stock Futures Contracts. The nature and terms of an SSF contract are set out in a brochure which the JSE publishes. In the brochure the JSE describes an SSF Contract as follows:

"SSFs are futures contracts on individually listed shares. A futures contract is a legally binding agreement that gives the investor the right to buy or sell an underlying listed share at a fixed price on a fixed date."

Whilst the purchase of an SSF Contract provides the holder of an SSF Contract with the right to buy or sell a share in a company at a future date, it does not equate to a share in a company.

Upon an investor purchasing an SSF contract the JSE brochure provides that:

"A contract holder can exit a Futures Contract before the expiry date (this is called closing your position) or keep the contract until the expiration date."

[6] "*Futures*" are more eloquently described in the judgment of my brother Mr Justice Classen in the unreported judgment of Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd case number 2009/35416 56 HC at para 1 where the following is stated:

"[1] The case concerns the exchange trade of "derivatives" and "futures" securities in the form of corporate shares on the ALT-X exchange. This type of trading has been explained as follows:

'Futures and commodity options trading is among humanity's more impenetrable concepts. It involves selling what one does not own and, as a rule, buying what one does not want. It is deeply shrouded in terminology that conceals its meaning. It operates in an arena where opinion is everything, where supply and demand are hard to distinguish from supposition and doctrine, and where inherent uncertainty has spawned an endless holy war between two religious-sounding antagonists, the "fundamentalists" and the "chartists", not to mention the new breed of computer-dependent faithful. Into this world comes the general public, eager to enjoy its riches and often unprepared to become its poor.'[1]

[7] The listing requirements regulate the buying and selling of shares between companies listed within the JSE. I proceed to set out hereunder the provisions of the relevant listing requirements in the present case.

7.1. Section 5.69 provides:

"REQUIREMENTS FOR SPECIFIC AUTHORITY TO REPURCHASE SECURITIES ("SPECIFIC PURCHASE")

5.69 In respect of specific repurchases ..... an applicant may only make a specific repurchase subject to the following....

....

(b)Approval being given in terms of a special resolution of the company by securities holders excluding, in the case of a specific offer, any shareholder and its associates that are participating in the purchase;"

[1] PM Johnson & TL Hazen, Commodities Regulation (2nd ed, Little Brown and Company, 1989) Volume III at p. 155. As a matter of interest, the Enron scandal in America occurred as a result of Enron trading energy futures.

7.2. Section 5.82 provides

"DERIVIATIVE TRANSACTIONS RELATING TO THE REPURCHASE OF SECURITIES (GENERAL AUTHORITY)

5.82 Issuers who enter into derivative transactions that may or will result in the repurchase of securities in terms of their general authority must comply with paragraphs 5.67 to 5.81..."

7.3. The terms of the shareholders' resolution in respect of a specific purchase are dealt with in section 5.67(a) which provides that the repurchase must be:

"On terms that are approved by the securities holders in general meeting in respect of that particular repurchase ('a specific repurchase of securities')..."

6.4. Section 5.67(b) which deals with the general authority provides:

"Generally approved by securities holders by giving of a renewable mandate .... to the directors of a company to repurchase its securities subject to the requirements of the JSE and to any other restrictions set out in the mandate ('a general repurchase of securities')."

<u>The facts</u>

[8] Huge Group Limited ("Huge") was a public company listed on the JSE and Anton Daniel Potgieter and James Charles Herbst (the applicants) were directors of that company.

SSFs relating to Huge Shares could be traded on the JSE. They were physically settled SSFs meaning they were contracts whereunder the buyer would become obliged to take delivery thereof in three months time against payment of an agreed price. Upon entering an SSF contract a buyer could gear himself up having to pay only an initial margin and pay or receive, whatever the case may be, daily margin payments equalling the daily fluctuations in the price of the Huge Shares.

[9] The applicants had taken large positions in respect of Huge Shares on the JSE Futures Market. Watermark acted as broker for the applicants and Huge whilst Standard Bank acted as Clearing Bank for Watermark.

[10] As between Standard Bank, as the clearing bank and Watermark as the broker, Standard Bank could call for payment by Watermak of an additional margin in any amount. On 15 October 2008 Standard Bank called upon Watermark to pay an additional margin on the SSFs relating to Huge Shares up to 250 percent of the initial margin.

As between the applicants and Watermark, Watermark could only call for payment of additional margin up to 100 percent of the initial margin.

[11] Despite this being the position on 15 October 2008 Watermark called upon the applicants to pay an additional margin of 250 percent of the initial margin which the applicants refused to do.

On 16 October 2008 Watermark purported to "close out" the applicant's positions by taking over about half of the applicant's SSFs. By so doing Watermark assumed R30 million of applicant's financial obligations and each of the applicants became entitled to repayment of over R1.6 million in respect of their variation margin accounts.

[12] On the same day Watermark purported to sell the SSFs to Huge at a price which according to applicants was based on a price of 362 cents per Huge Share, but which with finance costs came to 371 cents and 372 cents per Huge Share. This was in any event above the Market price of 307 cents per Huge Share on that day. The acquisition of the SSFs resulted in Huge suffering large losses in excess of R25 million.

[13] To protect shareholders against directors causing their company to repurchase its own securities, the Listing Requirements (Section 5.69) require repurchase of securities to be authorised by a special resolution of shareholders. They also require derivate transactions which will or may result in the repurchase by a company of its own securities, to be authorised by a special resolution of shareholders (section 5.89). thus making section 5.69 applicable to derivate transactions.

[14] The JSE found the applicants to be in breach of section 5.69 and fined them R5 million each. The decisions of the Appeal Board included a decision upholding the appeal and setting aside the decisions of the JSE. Further, the Appeal Board made a decision to substitute different findings in place of those which had been set aside and to impose a penalty on each of the applicants of R3 million.

[15] It is these decisions which the applicants seek to have reviewed and set aside. They are articulated in paragraph 3 and 4 of the award. These are :

15.1. The finding that Huge and applicants breached section 5.69 read with section 5.82 of the listing requirements in that Huge represented by the appellants entered into derivative transactions that might or would result in the repurchase by Huge of its securities without complying with section 5.69 of the listings requirements in that the approval of the shareholders in terms of a special resolution of Huge was not given for such transactions and ;

15.2. The imposition of a fine of R3 million.

[16] Counsel for the fourth respondent has argued strenuously for the upholding of the decision by the Board and dismissing the application for review whilst applicant's counsel has pursued the relief sought with vigour.

The law

[17] The Appeal Board's authority is set out in section 26B(15) of the FSB Act as follows:

The Board has authority to "confirm, set aside or vary the decision under appeal .....[or] remit the matter for reconsideration by the decision maker...."

Upon a proper examination of the parameters within which the Board operates, its decision, namely, that the applicants contravened section 5.69 read with 5.82 of the listing requirements was a decision the Board had no authority to take in terms of the provisions quoted above. The JSE had never charged the applicants with a contravention of section 5.69 read with section 5.82 of the listing requirements. The JSE charged and found the applicants

guilty of contravening the provisions of section 5.69 of the listing requirements.

[18] Section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) deals with judicial review of administrative action.

18.1. At 6(2)(f)(i) it provides:

"A court or tribunal has the power to judicial review an administrative action if-

(a) .....

(b) .....

(f) The action itself-

(i) Contravenes a law or is not authorised by the empowering provision;...."

This section requires that there be a source of the authority for the administrative action and that the taking of such action must remain within the limits provided for in such source of authority.

18.2. The above section must be read with section 6(2)(a)(i) which provides:

"A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) Was not authorised to do so by the empowering provision"

This section deals with the authority of the administrator who takes the decision whilst the other section quoted (supra) relates to the decision itself.

On a proper reading of both subsections of section 6, the decision of the Board does not pass muster. The board is a creature of statute and it cannot go beyond the parameters under which it operates.

[19] Even if one were to assume that the Board had the power to consider a contravention of section 5.82 by the applicants, it would have had to apply the **audi alteram partem** principle by giving the applicants notice as provided for in section 3(2)(b)(i) of PAJA which provides:

"(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection(4) must give a person referred to in subsection(1)-

(i) Adequate notice of the nature and purpose of the proposed administrative action."

Failure to give notice to the affected party results in procedural unfairness which renders the administrative action reviewable.

[20] The imposition of a fine of R3 million by the Board has equally to be weighed in terms of the PAJA provisions. In particular section 6(2)(e)(iii) of PAJA provides:

20.1. "(2)A court or tribunal has the power to judicially review an administrative action if-

(i)…..

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;"

The bringing in of section 5.82 by the Board when that had not formed part of the JSE decision was bringing in an irrelevant consideration which renders the decision reviewable.

20.2. Similaly section 6(2)(f)(ii)(cc) is applicable in making an administrative action reviewable if:

"(f) The action itself-

(i) *……..*

(ii) *Is not rationally connected to-*

(aa)……

(cc) the information before the administrator;"

A rationality review is based on an absence of rationality between the information before decision maker and which he relied on to form the basis of its decision. It does not refer to the rational connection between reasons given and the decisions but rather the information upon which the decision is based.

Again, the finding was based on the provisions of section 5.82 which had not formed part of the original JSE decision. The decision is therefore rendered reviewable in terms of section 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

[21] In **Pharmaceutical Manufacturers Association of SA: In re: Ex Parte President of the Republic of South Africa 2000 (2) SA 647 paras 85 and 86** the Constitutional Court approved rationality as a minimum threshold requirement applicable to the exercise of all public powers.

[22] The SSF positions taken by the applicants started to unravel when Standard Bank (the clearing member) demanded payment of an extra margin from Watermark (the broker). When Watermark tried to pass on this demand by demanding payment of that margin from applicants, the latter refused to pay as the margin payable by them was contractually limited to 100 percent. Watermark nevertheless decided to take over their positions even though they were not in default. Watermark thereafter looked for a buyer. Huge, the company in which applicants were directors offered to buy and subsequently entered into a contract with Watermark. This is what set the cat among pigeons in that the sale was effected amongst related parties without the necessary authorisation in terms of the listing requirements. The transaction looked suspicious as it appeared as if applicants had palmed off their risk to the company in which they were directors.

[23] Fourth respondent entered the fray as the regulator and pointed out the possibility of an infringement of the listing requirements to the applicants. This was followed by copious correspondents which included a rebuttal by the applicants of the allegations by the fourth respondent. This culminated in the decision by fourth respondent to charge the applicants for contravening section 5.69 of the listing requirements. The applicants were found guilty and fined five million rands.

[24] The applicants appealed the decision to the Appeal Board and the Appeal Board rendered a decision part of which reads as follows:

"[47] The next question is whether Huge, and consequently the appellants, contravened section 5.69 by making a specific repurchase of Huge's securities. We think they did not. The L.R defines "securities" "as described in terms of the (Act)" and in the Act they are defined to include "derivative instruments." The SSFs being derivative instruments, it appears at first blush that section 5.69, referring as it does to the purchase of securities, thereby includes derivative instruments in its ambit. However, section 5.82 says-

"Issuers who enter into derivative transactions that may or will result in the repurchase of securities in terms of their general authority must comply with paragraphs 5.67 to 5.81 subject to the exemptions in paragraph 5.83 and additions in paragraph 5.84."

[48] That provision sheds light on section 5.69 by distinguishing the repurchase of securities from the conclusion of derivative transactions. Huge's purchase of the SSFs entailed derivative transactions. Accepting, as we do, that it was clearly shown that the SSFs in question were physically settled, those were transactions that might or would result in the repurchase of securities in the form of the underlying Huge shares but did not constitute such repurchase in themselves. It follows that the appellants did not contravene section 5.69 in the respects found by the JSE."

[25] Effectively this part of the Appeal Board decision appeared to exonerate the applicants in the form of a successful appeal. The matter however did not end there. The Board went on to state as follows:

"[49] It was nevertheless required by section 5.82 that Huge had, in entering into SSF transaction, to comply with section 5.69. even though, arguably, the purchase of the SSFs might not have resulted in an eventual share repurchase, it was required that the purchase of the SSFs be approved by shareholders in terms of a special resolution of Huge. No such resolution was

obtained. In at least that respect there was non-compliance with section 5.69 both by Huge and, on the basis discussed above, by the appellants personally. The omission by the JSE to find also a concurrent contravention of section 5.82 was not a fatal irregularity. The case pursued against the appellants was throughout one that involved the failure, when the SSFs were acquired by Huge, to obtain a shareholders' resolution in compliance with section 5.69. The fact that that was required by section 5.82 did not alter the nature of the case or mislead the appellants.

[50] It follows that the appellants were liable to an appropriate penalty for having personally contravened section 5.69 in the respect just referred to.

[51] For reasons already advanced it was within the jurisdiction of the JSE to take into account any concomitant breach of the appellants' fiduciary duty to ensure compliance by Huge with the LR.

[52] As to the matter of penalty imposed on each appellant, we have mentioned that counsel for the JSE fairly accepted that if the case were shorn of the sham aspect a significant reduction in the fines would be appropriate. As we have said above, in no findings which are now on appeal did the JSE express or imply that there had been a sham. The consequence of a sham not having been found is that the basis for holding that the purchase by Huge was from a related party falls away. In any event the agreement between the appellants and Watermark imported application of the relevant default provisions of the Derivative Rules which allowed Davis to close out. Although he could not have demanded the 250 percent increase from them the appellants declined to pay him at all and Davis would have been entitled in terms of their agreement to regard that as default. In those circumstances, and in the absence of Davis having been discredited, one cannot summarily brush aside the appellants' assertation that Huge purchased the SSFs from Davis pursuant to a close out. In addition, not being legally empowered to enquire into and punish in respect of the offence of contravening section 85 of the Companies Act, the JSE had no jurisdiction to find that that offence had been committed by Huge and the appellants were implicated in its commission. Those factors warrant amelioration of the fines.

[53] On the other hand even if the appellants did not positively enhance their patrimony they must have known that this was not a transaction within the ambit of the company's strategy but a piece of ad hoc opportunism, without a shareholders' resolution, by means of which they reduced substantial financial risks to themselves and countenanced their being foisted on Huge. The purchase by Huge, if not from related parties, was nonetheless in substance from related parties and the appellants must have been aware of that. Huge had not settled the SSFs by the time the appeal was heard and had simply "rolled them over". The acquisition cost Huge over R19 million even if one disregards the market-to-market losses on 16 October 2008 as of dubious significance. We also think that the price payable by Huge was not justifiable. It was appreciably more than the day's market price. It was also not supported by the price paid by Mokholo, which the record shows clearly enough was not market related.

[54] Balancing the features mentioned in the preceding two paragraphs, the matter is still, in our view, one which falls for a substantial fine to be imposed on each of the appellants. We consider that the fine which should be substituted for that imposed by the JSE is R3 million in respect of each appellant."

[26] These findings were further encapsulated in the Board's order which reads as follows:

"[57] The Board's order is consequently as follows:

1. *The appeal is allowed with costs.*
2. *The following findings by the JSE are set aside-*
   - 2.1. *That Huge acted contrary to the provisions of section 85 of the Companies Act;*
   - 2.2. *That Huge and the appellants breached section 5.69 of the Listings Requirements by way of Huge having effected a specific repurchase of its securities from related parties.*

3. *Substituted for the finding set aside in 2.2 above is the finding that Huge and the appellants breached section 5.69 read with section 5.82, of the Listings Requirements in that Huge, represented by the appellants, entered into derivative transactions that might or would result in the repurchase by Huge of its securities in terms of a general authority without complying with section 5.69 in that approval of shareholders in terms of a special resolution of Huge was not given for such transactions.*
4. *The penalty of R5 million imposed upon each appellant is set aside and substituted therefore is a fine on each appellant of R3 million.*
5. *The following cost orders are made-*
   5.1. *The costs awarded in this order will include the costs of two counsel.*
   5.2. *The appellants are ordered to pay the costs of the application to supplement the grounds of appeal.*
   5.3. *The JSE is ordered to pay the wasted costs of the hearing on 3 March 2011.*
6. *The JSE is ordered to ensure the publication of the terms of this order in SENS."*

[27] The applicants seek a review of paragraph 3 and 4 of the Board's order mainly on two grounds:

27.1. As stated (supra) the Board acted **ultra vires** by substituting its own determination on a matter or matters which had not formed part of the decision appealed against.

27.2. The applicants had not been afforded the benefit of the **audi alteram partem** principle in that their right to be heard had been denied with regard to the charge of contravening section 5.82 of the Listing Requirements. This was not in accordance with the law as stated in PAJA (supra).

[28] Mr Cilliers S.C, for the fourth respondent has argued that the Board is entitled to vary the decision appealed against by substituting its own determination

and that by so doing it acted within the powers conferred on it by section 26B(15) of the FSB Act.

Mr Unterhalter S.C for the applicants argues to the contrary.

[29] It is common cause that the JSE did not charge the applicants with a contravention of section 5.69 read with section 5.82 of the Listings Requirements and did not find the applicants guilty of that charge or any charge involving section 5.82 of the listing requirements. The JSE charged and found the applicants guilty of section 5.69 of the listing requirements.

[30] Section 6(2)(f)(i) read with section 6(2)(a)(i) of PAJA requires that there be a source of the authority for the taking of administrative action and that the taking of such action must remain within the limits provided for in such source of authority.

[31] There had also been no reference at all to a contravention of section 5.82 in the correspondence between the JSE and the applicants prior to the applicants being found guilty by the JSE. The raising of section 5.82 in the Board deliberations was part of the argument by appellants who raised it as a matter that ought to have been considered by the JSE. For the board to turn around and create a 'new charge' was quite an unexpected event.

The Appeal Board also recognises this omission in its own judgment when it states at paragraph 49:

"The omission by the JSE to find also a concurrent contravention of section 5.82 was not a fatal irregularity."

The Appeal Board, despite this observation goes on to find in the substituted order that "The appellants breached section 5.69 read with section 5.82 of the Listing Requirements....."

[32] What is clear to me is that it is the JSE that lays the charge for any contravention of the Listing Requirements and that it is also the JSE that would after the appropriate investigations find the culprit guilty.

The person or entity found guilty then has the right to take the matter by way of appeal to the Appeal Board. It does not seem to me to be proper to circumvent this established procedure by simply deeming a failure to charge appropriately as a non fatal omission and going on to substitute a charge and find the persons or entity involved guilty after making the substitution. It does not seem to me that this is a correct interpretation of the word "vary" in the FSB Act. A variation of the original decision must be a variation within the four corners of that decision and not by an importation of new charges into the decision appealed against.

The variation occurs within the scheme of the decision which was made. This seems to me to be the basis of section 26B(15)(B) which enjoins the Appeal Board to remit the matter for reconsideration by the decision-maker concerned in accordance with such directions as the Appeal Board may determine.

[33] Whether an administrator's action is authorised is a question which must be answered with reference to the empowering statute.

See **Harris v Minister of Education 2001(8) BCLR 796(T) at 807F808C**

Mr Unterhalter for the appellants has argued, and I accept, that the Appeal Board does not have an inherent jurisdiction to expand the "decision under

appeal" nor does it have the jurisdiction to make a finding in respect of a matter which does not constitute the "decision under appeal."

[34] It would seem to me that a correct interpretation of the word "vary" in section 26B(15) of the FSB Act is to cater for situations where the decision-maker has a multi-faceted decision which the Appeal Board believes is in part correct and in part incorrect. In that case where an Appeal Board decides to uphold several, but not all facets of the multi-faceted decision, that would constitute a variation of the decision on appeal. Such a variation must however not result in a decision which goes beyond the decision under appeal.

[35] In this context it bears mentioning that there are numerous statutes in our law where the legislature grants an appeal body the power to substitute its own decision in place of the decision-maker. In that regard the power is bestowed on the Appeal Body expressly and not tacitly or by implication.

See section 35(5) of the Occupational Health and Safety Act 85 of 1993;

Section 46(2) of the National Ports Act 12 of 2005 and

Section 30(6) of the Private Security Industry Relation Act 56 of 2001

[36] It is therefore logical to accept that the absence of an express provision empowering the Appeal Board with the jurisdiction to substitute its own decision in place of the decision of the JSE is an indication that the Appeal Board cannot assume such powers on its own. The Appeal Board could therefore not substitute its own decision in place of the decision appealed against. Put in another way section 26B(15) does not empower the Appeal Board to reconsider the matter. It is left to the original decision maker (the JSE) to reconsider the matter. To that end, the Board may exercise the power of remittal.

[37] Consequently, I have come to the conclusion that it was beyond the power of the Appeal Board to find that the applicants had contravened section 5.69 read with 5.82 of the listing requirements.

Procedural unfairness and natural justice

[38] The applicants submit in this regard that a contravention of section 5.69 read with section 5.82 of the listing requirements was taken in a procedurally unfair manner in that the charge was not put to the applicants by the Appeal Board (or the JSE) and that the applicants were not afforded an opportunity to put facts before the Appeal Board to deal with the new charge.

[39] Mr Cilliers for the fourth respondent submits with reference to several passages in the appeal record that section 5.82 was debated at length before the Appeal Board. He submits that applicants can therefore not be heard to say they were not given an opportunity to make submissions with regard to a charge in terms of section 5.82.

[40] Mr Unterhalter, who did not appear in the Appeal Board proceedings concedes that indeed 5.82 was debated but goes on to explain the context in which such debate took place.

It was the contention of the applicants that the JSE had wrongly charged them in terms of section 5.69 of the listing requirements and that a correct charge ought to have been preferred under section 5.82.

[41] As can be seen from the decision of the Board (supra) the Appeal Board upheld the applicants appeal and set aside the finding of the JSE with regard to the charge under section 5.69.

[42] Mr Cilliers has argued that putting the charge under section 5.82 was immaterial in that the applicants would not have had a valid defence against such charge. In essence this submission assumes that the outcome would have been the same whether such charge was put to the applicants or not. This has been sometimes referred to as the "no defence principle."

[43] In this regard, **Mureinik 1985 SAJHR** 48 is quoted in the case of **Administrator, Transvaal and Others v Zenzile and Others 1991(1) SA *21(A)*** *by Hoexter JA at 36J-37E as follows:*

"... perhaps pre-eminent amongst the qualities of a power that attracts natural justice is its susceptibility to be characterised as "disciplinary" or "punitive".

The learned author explains that the reasons for this are rooted both in history and in principle; but that the latter are crucial. At 50-1 he summarises the reasons of principle thus:

"Where the power is disciplinary, all the usual reasons for importing natural justice generally apply, and generally apply with more than the usual vigour: the gravity of the consequences for the individual, consequences both concrete and such as affect his reputation; the invasion of the individual's rights; that fairness postulates inquiry; and so on. But more than this, there is a reason of principle peculiar to disciplinary or punitive proceedings: that even if the offence cannot be disputed, there is always something that can be said about sentence. And if there is something that can be said about it, there is something that should be heard..."

It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade administrative Law 6th ed puts the matter thus at 533-4:

'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'

The learnerd author goes on to cite the well-known dictum of Megarry J in **John v Rees [1970] Ch 345 at 402:**

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

[44] The issue of the rules of natural justice is further traversed in **Yates v University of Bophuthatswana and Others 1994(3) SA 815 at 835 F-J** as follows:

''It is to be welcomed that the principles of natural justice escalate with increasing strength. Basically they constitute the forthright values of 'those fundamental principles of fairness which underlie and ought to underlie every civilised system of law.' Basically people have an instinctive reaction to what is fair and unfair. To put it differently and in a pragmatic fashion, there is a folk saying 'right was right and wrong was wrong and you did not have to talk

about it.' The requirements of natural justice that I have referred to are germane to a general duty to act fairly."

According to Baxter Administrative Law at 540:

'The principles of natural justice are considered to be so important that they are enforced by the Courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration the enforcement serves as a lesson for future administrative action. But more than that, and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignored. The policy of the Courts was crisply stated by Lord Wright in 1943:

"If the principles of natural justice are violated, in respect of any decision, it is, Indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

...

The Courts have therefore nearly always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter, the isolated decisions which have overlooked this have seldom received subsequent judicial endorsement."

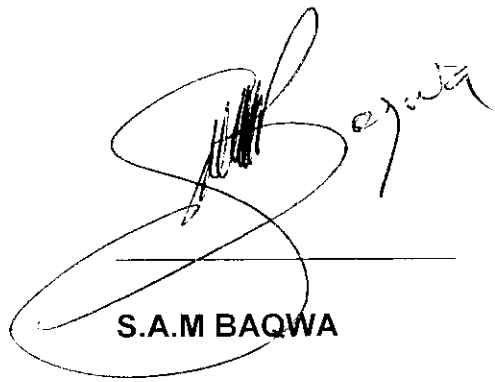
[45] Counsel on either side have made submissions for an order for and against remittal to the Appeal Board. As matters stand, it is the JSE that lays and prosecutes charges and not the Appeal Board. Consequently to remit the matter to the Appeal Board would not serve any purpose. Effectively an order setting aside paragraph 3 and 4 of the Board's award would leave the matter in the hands of the JSE to take any further steps it may deem necessary.

[46] For the reasons set out above I have come to the conclusion that paragraph 3 of the award should be reviewed and set aside. Consequently the decision in paragraph 4 of the award falls to be set aside.

[47] In the circumstances, the applicants have succeeded and the following order is made:

47.1. The decision of the first to third respondents (the Appeal Board) set out in paragraphs 3 and 4 of the Appeal Board's decision dated 3 July 2012 is hereby reviewed and set aside.

47.2. The applicants are awarded the costs of the application which shall be paid by the fourth respondent and which shall include costs of two counsel.



S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

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