

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA  
HELD AT CAPE TOWN.**

**Case No. CA 12/2001**

In the matter between:

**COUNTY FAIR FOODS (PTY) LIMITED**

**Appellant**

And

**COMMISSIONER FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

**First Respondent**

**U BULBRING N.O.**

**Second Respondent**

**OIL, CHEMICAL, GENERAL AND ALLIED  
WORKERS' UNION obo J ALEXANDER**

**Third Respondent**

**JUDGMENT.**

**DAVIS AJA**

**INTRODUCTION.**

[1] On 15 September 2000 second respondent found that Joseph Alexander's ('Alexander') dismissal by the appellant had been procedurally unfair. The appellant was ordered to pay Alexander 10 months and 8 days salary as compensation.

[2] Appellant sought to review the second respondent's award. The application for review was dismissed by **Waglay J** on 28 September 2000.

**FACTUAL BACKGROUND**

[3]. The substantive issue which gave rise to this dispute concerned the dismissal of Alexander by first appellant on 30 September 1999 for an assault on a fellow

employee, one Bianca Koopman, on 22 September 1999. A disciplinary enquiry which was conducted by Mr Kemp, plant manager of appellant, found Alexander guilty of assaulting Koopman. Mitigating factors were then presented to the enquiry by Alexander as a result of which Kemp imposed a sanction of twelve months final written warning and a five day unpaid suspension.

[4] Two days later Alexander was advised that, following consultation with its senior management, appellant was of the view that Kemp's penalty was 'contradictory to the principle and precedent [of] the company'.

[5] Mr Godwin Midgley, general manager, primary processing, then altered the sanction to one of dismissal. Alexander appealed on 3 October 1999. The minutes of the appeal held on 14 October 1999 reflect that the sole ground of appeal was procedural unfairness – the argument being that the first sanction must stand. The chairman of this enquiry, Mr Potgieter, found that the company had a strong policy in favour of dismissal in these kind of cases and that insufficient mitigatory factors existed for the sanction, as amended, not to be applied.

[6] This decision gave rise to a dispute, which eventually occasioned an arbitration before second respondent, who found the dismissal to be procedurally unfair and ordered appellant to pay Alexander R22 539,80 within fourteen days of the date of the award. An application for the review of this decision was unsuccessful before the Court **a quo**.

[7] Mr Kahanovitz, who appeared on behalf of appellant, raised two essential attacks against the judgment of the Court **a quo**, being the right of third respondent to represent Alexander and the conclusion on the merits which he submitted was unjustified.

#### **THE RIGHT OF THIRD RESPONDENT TO REPRESENT ALEXANDER.**

[8] The dispute was initially referred to first respondent. The referring party was cited as being The Farm, Food and Rural Workers' Support Association ('FFRWSA'). On 4 April 2000 FFRWSA sent a fax to first respondent advising that as it could not contact Alexander, it could no longer represent him. On 6 April 2000 being the day of the arbitration, Alexander arrived with a representative of third respondent, being the union which Alexander had joined on the same day.

[9] At the commencement of the arbitration, appellant objected to third respondent's presence and its representation of Alexander. Appellant contended that, since the party to the dispute was FFRWSA, it could not simply be substituted by the third respondent. Since third respondent was not a party to the conciliation it could therefore not take over the dispute as a substitute for FFRWSA. Since the latter had withdrawn, the dispute had to be referred afresh for conciliation. Second respondent considered these arguments and found that FFRWSA had referred the dispute to conciliation and arbitration in its capacity as representative of Alexander. When it withdrew, it did not mean that the dispute had been withdrawn, a fact which was supported by FFRWSA advising first respondent that Alexander would continue to represent himself at the arbitration proceedings.

[10] Second respondent therefore rejected the argument of appellant, which argument was also dismissed by the court **a quo**. In so rejecting this argument **Waglay J** said 'The fact that a party, who refers a dispute on behalf of another, withdraws from the dispute does not mean, as the second respondent properly found, that the dispute is "no longer alive". If a dispute remains unresolved, the parties of the dispute, i.e. the grievant, should be and is allowed to proceed if he so desires as the grievant is allowed to proceed with its dispute. He is entitled to such representation as is permissible in terms of the Labour Relations Act.....Applicant's argument that Alexander was not a party to the proceedings is so meritless a point that simply needs to reject it as if anything a desperate attempt

and a rather superficial one to place barriers in the way of resolving the dispute that exists between Alexander and the applicant' (at para 6 - 7 of the typed judgment)

[11] Mr Kahanovitz submitted that, absent substitution, the referring party to any dispute is a particular person (be it a union or the employee) whose identity remains the same throughout the process. Where a union is the referring party with regard to a dismissal dispute on behalf of a member the latter has a legal interest in the proceedings. However, the fact that an employee has a legal interest does not imply that he or she is also a party to the proceedings (in a sense that the term is employed when referring to an applicant or plaintiff as a party).

[12] An examination of the completed referral form of first respondent reveals that the referring party was FFRWSA. The form was signed on its behalf by one of its officials. FFRWSA was entitled to refer the matter because Alexander, who was the party to a dismissal dispute, was a member of the union. Accordingly FFRWSA was exercising its right in terms of section 200(1) of the Labour Relations Act 36 of 1995 ('the Act'), and in terms of which, according to Mr Kahanovitz, Alexander was not named as a party to the proceedings. FFRWSA was the referring party and was the **dominus litis**. Thus appellant need only deal with FFRWSA and it could accept that any agreement reached between itself and the union would settle the dispute before first respondent. The dismissed employee would not have to be a party to the agreement because he or she was not a party to the proceedings.

[13] If, by contrast, FFRWSA was the referring party and decided, for its own reasons, to withdraw a referral, that was the end of the matter. The only referring party was free to withdraw and, as the agent of its member, that member was bound by the action of his or her union. In support of this argument Mr Kahanovitz referred to Rule 12(5) of first

respondent's rules which provides: 'If in any proceedings it becomes necessary to substitute a person, for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the Commission for an order substituting that person for an existing party and the Commission may make such order or give such directions as to the further procedure in the proceedings as it deems fit'.

[14] According to Mr Kahanovitz, as FFRWFA withdrew from the proceedings, Alexander or third respondent was obliged to make application to first respondent to substitute itself for the existing party. Had third respondent made an application to become a party at that time it would have been appropriate to consider whether a union (third respondent) which had hitherto not been a party to the dispute (having neither represented the employee at the hearing or during the conciliation stage) had **locus standi** to substitute itself for the employee's erstwhile collective bargaining representative.

[15] For this reason, Mr Kahanovitz submitted that second respondent was, at the very least, obliged to apply her mind to the Rules made in terms of section 116 (1)(cA) (iii) of the Act and the question of whether third respondent with whom Alexander had signed up as a member on the very morning and, apparently only for the purpose of the hearing, was entitled to represent Alexander. According to Mr Kahanovitz second respondent had committed an error of law by considering third respondent's application for rights of audience in terms of section 200(1) of the Act which provides, **inter alia** that a registered trade union may act in the interests of any of its members. Section 200(2) of the Act provides that a registered trade union is entitled to be a party to any proceedings if one or more of its members is a party to those proceedings. Mr Kahanovitz submitted that a

reference in section 200 to the right to representation is a reference to the capacity of unions and employer's organisations to act in a dispute as a party.

[16] Mr Kahanovitz contended that the section which was dispositive of the present dispute, was section 138(4)(c) of the Act which provides that, in any arbitration proceedings, a party to a dispute may appear in person or be represented only by any member, office-bearer or officer of that party's registered trade union or registered employers organisation. The reference to 'union' in section 138(4)(c) was to a union which hitherto represented the employee party in the dispute.

[17] In my view, Mr Kahanovitz has sought to place an unduly restrictive interpretation upon these sections. In the present case, FFRWSA completed LRA Form 713 in terms of section 191 of the Act, the matter in dispute being described as the alleged unfair misconduct of Mr Joseph Alexander to be resolved through arbitration. It meant that there was a dispute between appellant and the union, which concerned another party, being Joseph Alexander. Indeed in the certificate of outcome of dispute referred for conciliation, the dispute is described as being between 'FFRWSA obo Joseph Alexander and appellant.'

[18] Accordingly, FFRWSA had done no more than represent a member in a dispute. When third respondent assumed that role, after FFRWSA withdrew, it did no more than represent the affected party to the dispute, being Mr Alexander. For this reason I find there to be no merit in the objection by appellant, namely that second respondent had committed an error of law by admitting third respondent to the proceedings, which error would justify a successful application for review. In short, there is no basis on which it could be said, within the context of the facts of the present dispute, that third respondent did not fall within s 138(4)(c) as a recognised representative of Alexander.

### **MERITS OF THE CASE.**

[19] The evidence placed before second respondent was that Kemp was appointed by appellant to chair the disciplinary enquiry. No evidence was presented by appellant to contradict the conclusion reached by second respondent that 'Kemp was clearly mandated by the company to make the final determination regarding the outcome of Alexander's disciplinary enquiry'. Second respondent found further that 'the company's disciplinary code and practice does not make provision for intervention or for the overruling of this sanction by a more senior

manager than the one appointed to chair the disciplinary enquiry.’

[20] The justification for interference with Kemp’s decision was contained in a letter sent to Alexander by Midgley on 30 September 1999 advising Alexander that his services had been terminated. The relevant portion of the letter reads as follows:

‘Upon review of the incident that took place on the night of 22 September 1999 and following consultation with senior management and in accordance with previous assault cases where the company had the precedent of terminating all offenders’ services the company has found your case identical to previous assault cases and as such, the penalty handed down by the chairman was totally contradictory to the principle and precedent of the company as established by all previous cases without exception. You are herewith informed that the company has overruled the decision of the chairman of the hearing and your services are herewith terminated with immediate effect. No different mitigating circumstances in your assault case from other cases could be found’

[21] Second respondent correctly found on the basis on Midgley’s own evidence that his decision represented the first time that this kind of intervention had taken place within appellant’s organisation. In the present dispute, there was no provision in appellant’s disciplinary code which could justify the kind of intervention which Midgley initiated in order to ensure the dismissal of Alexander. Alexander’s conduct was considered by a properly constituted disciplinary enquiry. The fact that the appellant sought to discipline Kemp for failing to comply with company policy and procedures and dismiss Alexander does not alter this conclusion. This dispute concerned the unfairness of interfering with the decision of the disciplinary tribunal which had properly been appointed by appellant and, to which interference, no express provision was contained in the disciplinary code which could justify the action taken by Midgley.

[22] In **BMW SA (Pty) Ltd v Van der Walt** 2001(21)ILJ 113 (LAC) **Conradie JA**

cautioned against the importation of the principles of **autrefois acquit** into labour law. He then made two cautionary remarks: ‘It may be that the second

disciplinary enquiry is ultra vires the employer's disciplinary code (Strydom v Usko Ltd [1997] 3 BLLR 343 (CCMA) at 350F-G). That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.' (at para 12).

[23] In the present case appellant acted without recourse to the express provision of its disciplinary code and on the basis of no precedent. Second Respondent decided that the evidence put up by appellant did not justify interference with the Kemp enquiry. In my view, there is no basis for concluding that the decision of second respondent was unjustifiable, in terms of the evidence which was presented at the arbitration hearing. Accordingly the appeal must fail. As the appeal was not opposed, the issue of costs does not arise

[24] In the result the appeal is dismissed.

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**DAVIS AJA**

**I agree.**

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**ZONDO J P**

**I agree.**

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**DU PLESSIS AJA**

**Appearances:**

**For the Appellant: Adv. C.S. Kahanovitz**  
**Instructed by: Cliffe Dekker Inc.**  
**Date of Hearing: 26 September 2002**  
**Date of Judgement: 11 December 2002**