

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO: DA 19/2002

REPORTABLE

In the matter between:

D. BRANFORD
Appellant

and

METRORAIL SERVICES (DURBAN)
Respondent

First

TRANSNET BARGAINING COUNCIL
Respondent

Second

J. G. REDDY N.O.
Respondent

Third

UTATU
Respondent

Fourth

JUDGMENT

WILLIS JA:

[1] The appellant (to whom I shall refer as “the employee”), appeals against the decision of the court *a quo* (*per* Ngcamu AJ) to review and set aside the award of Mr Reddy, the third respondent (to whom I shall refer as “the arbitrator”). The arbitrator was appointed from a panel of arbitrators in terms of the applicable agreement with the Transnet Bargaining Council (the second respondent) in order to determine whether the dismissal of the employee was unfair in terms of the Labour Relations Act, No. 66 of 1995, as amended (“the LRA”). It was conceded by Mr Shangase who appeared for the first respondent (to whom I shall refer as “the employer”) that the arbitrator, if he found the dismissal of the employee to have been unfair would have had to apply the remedies for unfair dismissal as provided for in section 197 of the LRA. The arbitrator had found the dismissal of the employee by the employer to have been unfair and ordered the employer to re-instate the employee with effect from 1st May, 2001, the day after the award was given. The employer then brought an application before the court *a quo* to review and set aside the arbitrator’s award. The grounds of the review were that arbitrator had exceeded his powers and/or committed a gross irregularity. During the appeal hearing, the first responded abandoned the ground that the arbitrator had exceeded his powers. The representatives of the parties

agreed that the principles of “unjustifiability” and “irrationality” referred to cases such as **Carephone (Pty) Ltd v Marcus N.O & Others** 1999 (3) SA 304 (LAC), (1998) 19 ILJ 1425 (LAC), [1998] 11 BLLR 1093 (LAC); **County Fair Foods (Pty) Ltd v CCMA & Others** (1999) 20 ILJ 1701; **Adcock Ingram Critical Care v CCMA & Others** (1999), 20 ILJ 1799 (LAC), [2001] 9 BLLR 979 (LAC); **Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others** (2001) 22 ILJ 1603 (LAC); **Stocks Civil Engineering (Pty) Ltd v Rip N.O. and Another** (2002) 23 ILJ 358 (LAC); **Crown Chickens Limited t/a Rocklands Poultry v Kapp & Others** (2002), 23 ILJ 863 (LAC), [2002] 6 BLLR 493 (LAC); **Miladys (A Division of Mr Price Group Limited) v Naidoo & Others** (2002) 23 ILJ 1234 (LAC) and **Bel Porto School Body v Premier Wstern Cape** 2002(3) SA 265 (CC) were irrelevant to the review of the case. No allegations pertaining thereto were made in the employer’s founding affidavit. The employer stated in its founding affidavit that it was relying on the provisions of section 33 of the Arbitration Act, No 42 of 1965. *Mr Bingham*, who appeared for the employee, very fairly conceded that it did not matter whether or not the application should have been brought in terms of section 145 of the LRA: the enquiry in this case is confined to whether or not a “gross irregularity” has been committed and the relevant

sections in both statutes (section 33 of the Arbitration Act and section 145 of the LRA) both provide that an arbitration award may be set aside if a gross irregularity was committed in the conduct of the arbitration proceedings. It is clear that the Labour Court had jurisdiction (See section 157(3) read with section 191(5)(a) of the LRA and **Stocks Civil Engineering (Pty) Ltd v Rip NO and Another** (2002) 23 ILJ 358 (LAC) at para [6]; [2002] 3 BLLR 189 (LAC)). *The court a quo* granted the relief sought by the employer. Leave to appeal to this court was granted by the court *a quo*.

[2] The employee, who had 21 years service with the employer, and who at the time of his dismissal was a Traffic Control Officer, was dismissed for making eight fraudulent petty cash claims totalling R834,00 for items such as tea, coffee, sugar and milk powder. The dismissal took place on 20th October, 2000. The employee referred his dispute concerning his alleged unfair dismissal to the relevant bargaining council, being the second respondent. After there had been an unsuccessful attempt at conciliation between the parties, the arbitrator was, as mentioned earlier, appointed in terms of the applicable bargaining council agreement to determine the matter. As has also been noted above, he found the

dismissal of the employee to have been unfair and ordered the re-instatement of the employee.

[3] The alleged misconduct of the employer is set out in the following manner:

- “1. During August 2000 the Applicant’s Financial Accounts Manager, Mrs Yasmin Gangadin scrutinized the invoice from Cambridge store which made her suspicious. The invoice did not have a stamp or Vat number. It also reflected the word refreshments without describing the goods supplied by (Mr Colin Palmer) did not correspond with his specimen signature.
2. Ms Yasmin Gangadin contacted Cambridge Store and faxed them a copy of the invoices. They informed her that they had not issued the invoices.
3. Ms Yasmin Gangadin informed her line manager and the matter came to th attention of the Regional Manager.
4. The regional manager, Mr Gouws, sanctioned the investigation by Transnet Group Audit Services (‘the Auditors’) into the alleged petty cash withdrawals.
5. On 16th August, 2000 the auditors concluded their investigation and submitted their report. The report is annexed hereto marked ”C.
6. It is evident from the report that:

6.1 The third respondent (i.e. “the employee”) made 8 fraudulent Petty Cash claims amounting to R834.00.

6.2 On several occasions the authorizing manager’s signature was forged on the petty cash claims/ payment forms to conceal the irregularity.

6.3 The third respondent made false written statements to the effect that Cambridge Store used more than one set of invoice books and made deliveries to the Respondent.”

[4] The employee did not testify at the arbitration hearing. The arbitrator

gave a careful and well reasoned award. The employee had, in the internal disciplinary, enquiry denied the allegations. What influenced the arbitrator, and is the issue upon which this appeal depends, was that prior to his dismissal the employee was given a recorded oral warning in respect of the very same facts. Although Mr Shangase attempted to argue that the facts giving rise to the recorded oral warning were different from those upon which the decision to dismiss was based, the furthest that the employer went in its founding affidavit was to allege that:

“It is clear from the evidence presented at the arbitration hearing that when Mr Colin Palmer issued the so-called verbal warning to the Third Respondent, he had no evidence demonstrating the seriousness of the misconduct committed by the Third Respondent.”

It is common cause that following a meeting at which the employee had been confronted with the allegations by Mr Palmer, the line manager, Mr Smit, the production manager (who was senior to Mr Palmer) and Mr Pillay, a senior manager in the finance department, he was given this recorded oral warning. It was formally issued by Mr Palmer. The finance department were advised accordingly. The record of the arbitration proceedings records the following evidence of Mr Palmer:

“I then requested a meeting with Senior Manager Pillay, Mr Smit, myself and Mr Branford (‘the employee’). The meeting was held in Pillay’s office. At the conclusion of the meeting Mr Pillay indicated that he would take no further action from the finance side and the matter is left in Smit’s hands. He said he would not refer the matter to audit but that Mr Smit must finalize the matter. At this stage no evidence given or shown to me. They may have been given to Mr Smit but I did not see them. Mr Smit, Mr Branford and I exited the meeting and outside the corridor Mr Smit asked Mr Branford to give him a full report in writing and the matter would be put to rest. As far as I was concerned from Smit’s side the matter was finalized and no further action was to be taken. I then took Branford to my office, closed the door and gave him a dressing down in the strongest terms and informed him that if any such infringements came up again, it would be out of my hands because of the pressure put on us by our CEO that Managers must discipline Junior Managers. I decided to record the warning and put it on his disciplinary sheet.”

It seems that factors that influenced the decision of leniency were that the

employee had successfully reduced overtime expenses in the Durban yard

by some R750 000,00 per year and radio costs by some R300 000,00 per

year, had introduced savings at the Springfield depot of some R250 000,00 per year and further savings of some R200 000,00 in Sarnia; and he had reduced the telephone costs of Train Operations by R100 000,00 per year. The employee had furthermore often acted successfully as a facilitator and an instructor in customer care programmes. It seems that an additional factor was that there had for some time, apparently, been a general laxity in the employer's offices about petty cash claims. The employee also had long service. There is nothing in the evidence to indicate that, on a balance of probabilities, that Mr Palmer had not been *bona fide* in issuing the oral warning or that he had no authority to do so. There is also no evidence to indicate that, on a balance of probabilities, there had been any collusion to save the employee from dismissal. An internal audit into the issue was, however, performed and it was recommended that the employee be formally charged with fraud, forgery and dishonesty. Although the auditors' report took a more serious view of the facts, it became common cause during the hearing that the report was not based on any facts which could be described as "new". Some time after the issue of the oral warning, the employee was formally so charged and a disciplinary enquiry convened with Mr Moeti, the Human Resources Manager at Portnet, as chair. Despite protests that the employee had already been disciplined in respect of the self same acts of

misconduct, Mr Moeti held that the employee was not being twice disciplined because the disciplinary code provided for more severe penalties for misconduct of such a serious nature. He decided to dismiss the employee. The arbitrator found that:

“ It is my conclusion therefore that the applicant’s argument that he was disciplined twice for the alleged infringements must be sustained.” and

“ the only appropriate relief herein is that of reinstatement. I do not however believe that given all the circumstances the applicant should be compensated in any way for the period between his dismissal and his reinstatement.”

[5] The court *a quo* held that: “The first hearing was a mere discussion between the line manager and the third respondent which resulted in the verbal warning.” The court *a quo* said that the arbitrator “did not take into account that the third respondent was disciplined for fraud but when the verbal warning was given it was for a mere irregularity.” The court *a quo* went on to say: “ I am also of the view that the arbitrator committed a gross irregularity in not taking into account the fact that the first sanction by the line manager was without any charge being proffered against the third respondent. It resulted from a discussion regarding the irregularity. No charges were proffered against the third respondent. I would have taken a different view if there were charges proffered against the third respondent and that as a result of those charges the line manager gave the

respondent a verbal warning. When the proper disciplinary hearing was held the third respondent was subjected to three charges and in my view that was a proper hearing that was held by the applicant.”

[6] In terms of section 197 (1) read with 197 (2) of the LRA, an arbitrator who finds that a dismissal is unfair is obliged to order reinstatement or re-employment of the employee unless:

- “ (a) the employee does not wish to be reinstated;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practical for the employer to reinstate or re-employ the employee;or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.”

Mr Shangase conceded that the only provision which could be of any relevance to this case was (b). The problem for the employer is that no such allegation appears to have been made in the arbitration proceedings and certainly not in the employer’s founding affidavit. Furthermore, the facts of this case do not compel such a conclusion as a necessary inference, on a balance of probabilities. It is not an invariable rule that offences involving dishonesty necessarily incur the penalty of dismissal. (See, for example, **Boardman Brothers v CWIU** 1998 (3) SA53 (SCA) at 59G; (1998) 19ILJ 517 (SCA); **Toyota SA Motors (Pty) Ltd v**

Radebe & Others (2000) 21ILJ 340 (LAC) at para [44])

[7] In **BMW (SA) (Pty) Ltd v Van der Walt** (2000) 21 ILJ 113 (LAC),

Conradie JA, with Nicholson JA concurring said at para [12]:

“ Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so. I agree with the dicta in **Amalgamated Engineering Union of Sa & Others v Carlton Paper of SA (Pty) Ltd** (1988) 9 ILJ 588 at 596A-D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res judicata* ought to be imported into labour law. They are public policy rules. The advantages of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick. See also **Botha v Gengold** [1996] BLLR 441 (IC); **Maliwa v Free State Consolidated Gold Mines (Operations) Ltd** (1989) 10 ILJ 934 (IC). I should make two cautionary remarks. It may be that the second 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.”

In the same case, Zondo AJP, as he then was, took a view that was more strongly against the holding of a second enquiry.

In my respectful view, the CCMA commissioner, Mr Rycroft, has given a very careful review of the law in regard to this issue in **Frost v Telkom SA** (2001) 22 ILJ 1253 (CCMA). In my view, he has, at least for most practical purposes, correctly summarised the position thus at 1260B: “ The norm in assessing the fairness of a disciplinary offence is a single disciplinary enquiry conducted in compliance with the employer’s

disciplinary code. Where there has been compliance with the company's disciplinary code and the first enquiry has adequately canvassed the facts involved, it will be unfair to hold a second enquiry."

[8] Assume that this court were to be persuaded that the arbitrator erred:
1 in finding that:

1.1 the enquiry which resulted in the dismissal of the employee was a second enquiry in respect of the same alleged acts of misconduct; and/or

1.2 the dismissal was unfair; and/or

2 in ordering the re-instatement of the employee.

Would this mean that the arbitrator had committed a "gross irregularity"?

In Goldfields Investment Ltd & Another v City Council of Johannesburg & Another 1938 TPD 551 at 560 Schreiner J, as he then was, said the following in considering whether a gross irregularity of the latent kind had occurred (Mr Shangase conceded that the arbitrator had committed no patent gross irregularity):

" In matters relating to the merits the magistrate may err by taking a wrong one of several views or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided

and therefore failing to afford the parties a fair trial. But that is not necessarily the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court's not merely missing or misunderstanding appoint of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial."

This extract was quoted with approval in the **Toyota** case (*supra*) at para [41] and in a long line of other cases in other courts and has been endorsed by the Supreme Court of Appeal, the most recent case in that court being **Paper Printing Wood & Allied Worlars Union v Pienaar NO & Others** 1993 (4) SA 631(A) at 638G; (1993) 14 ILJ 1187 (A).

I consider it appropriate to quote from the same **Toyota** case at para [53] where it was said:
 " If there is a yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed then it would seem to me that a gross irregularity has been committed. "

Although the context is different, I think the principle is relevant. The fact that a reviewing court may have a come to a different conclusion

from the decision sought to be reviewed (and the basis for arriving at it) does not mean that a gross irregularity has been committed. There comes a point, however, when the reviewing court is so offended by the yawning chasm between its reasoning and its conclusion on the one hand and that of the decision sought to be reviewed on the other, that it decides that a gross irregularity has been committed. In this case there may be room for legitimate debate about the correctness of the arbitrator's decisions covered in the points at the beginning of this paragraph. Opinions among reasonable men and women may differ. Nevertheless, one has no sense that there would be any "yawning chasms" between the reasoning of the arbitrator and that which any member of this court may have adopted. The arbitrator's reasoning can certainly not be said to have been so flawed that one must conclude that there has not been a fair adjudication of the issues. (See **Miladys v Naidoo & Others** (supra) at para [30].)

[7] In the light of the facts in this case and the current state of the law, it cannot be said that the arbitrator committed a gross irregularity in finding that the dismissal was unfair. Furthermore, I would wish to note that the relative informality with which the first disciplinary enquiry was held

does not, in itself, make it *pro non scripto*. There is therefore no basis upon which a court could interfere with the arbitrator's decision. The court *a quo* was wrong in deciding to interfere with the arbitrator's award.

[8] There is no reason why costs should not follow the result.

[9] I propose that the following order be made:

- i) The appeal is upheld;
- ii) The order of the court *a quo* is set aside and following is substituted therefor:

“ The application is dismissed with costs.”

- (iii) The first respondent is to pay the costs of the appeal.

WILLIS J A

JAFTA AJA:

[10] I have had occasion to read the judgment prepared by my brother **Willis JA** in this matter but regrettably I find myself constrained to respectfully disagree with his main finding on whether or not the

arbitrator committed a gross irregularity and the ultimate conclusion that the appeal should succeed. In my respectful view, the facts of the case and the applicable law demonstrate that the arbitrator misconceived the true legal position before arriving at the main finding to the effect that the appellant could not be disciplined twice for the alleged infringements and as a result the dismissal which was imposed pursuant to the formal disciplinary enquiry was rendered unfair by the sole basis that the appellant had previously been issued with a written warning.

[11] In the review application, in the court a quo, the arbitrator's award was challenged on, inter alia, the basis that he committed a gross irregularity in failing to note that the determination of whether the employee could be disciplined more than once for the same offence depends on whether or not it is fair to do so. In the founding affidavit, this ground of review was articulated in the following terms:

“ The issue of paramount importance is fairness as opposed to importing the inflexible legal principles into the sphere of the employer-employee relationship.

32.5 The second respondent omitted to decide the fairness or otherwise of subjecting the third respondent to a disciplinary enquiry and failed to decide on the merits or demerits of the case.”

[12] The aforesaid ground appears to have been extracted from the decision of this court in **BMW (SA) Pty Ltd v Van der Walt (2000) 21 ILJ 113 (LAC)**. In that matter the court had to consider the propriety of instituting a second disciplinary enquiry against an employee. Writing for the majority **Conradie JA** (with whom **Nicholson JA** concurred) answered the question by stating the following principle at para [12]:

“[12] Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, **depend upon whether it is, in all the circumstances fair to do so.** I agree with the dicta in **Amalgamated Engineering Union of SA & Others v Carlton Paper of SA (Pty) Ltd (1998) 9 ILJ 588 (IC)** at 596 A-D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res judicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm, which may in individual cases be caused by the application of the rule. **In labour law fairness and fairness alone is the yardstick.** See also **Botha v Gengold [1996] BLLR 441 (IC)**; **Maliwa v Free State Consolidated Gold Mines (Operations) Ltd (1989) 10 ILJ 934 (IC)**. I should make two cautionary remarks. It may be that the second disciplinary enquiry is *ultra vires* the employer’s disciplinary code (**Strydom v Lesko Ltd [1997] 3 BLLR 343 (CCMA)** at 350 F-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.” [Emphasis supplied]

[13] Although during the hearing of this appeal Mr Bingham, for the appellant, contended that the test laid down in **Van der Walt’s** case (*supra*) was that a second enquiry was permissible only in exceptional circumstances, that is not borne out by the dictum in para [12] quoted above. In that paragraph it is quite clear that **Conradie JA** considered

fairness alone to be the decisive factor in determining whether or not the second enquiry is justified. The learned Judge of appeal mentioned the issue of exceptional circumstances merely as one of the two caveats and not as the actual or real test to be applied. Therefore, in my view, it is incorrect to contend that the test espoused in **Van der Walt** is that a second enquiry would only be permissible in exceptional circumstances. The true legal position as pronounced in **Van der Walt** is that a second enquiry would be justified if it would be fair to institute it. This is also the interpretation attached to para [12] by **Zondo JP** in the minority judgment in the same matter. At para [32] the learned Judge President stated:

“[32] My colleague Conradie JA, expresses the view in his judgment that an employer is entitled to subject an employee to more than one disciplinary enquiry if it is fair to do so. Elsewhere he says it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances. According to Conradie JA, the test whether or not an employer is entitled to subject an employee to more than one disciplinary enquiry is whether or not it would be fair for the employer to do so.”

[14] The concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case. In **National**

Union of Metalworkers of SA v Vetsak Co-operative Ltd 1996 (4) SA 577 (A), Smalberger JA made the following remarks on fairness at 589 C-D:

“ Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (Num v Free State Cons at 446I). And in doing so it must have due regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or attempt to lay down, any universally applicable test for deciding what is fair.”

[15] The record of the arbitration proceedings in the present matter reveals abundantly clear that circumstances leading to two punishments that were imposed on the appellant, were placed before the arbitrator. The evidence of Mr Colin Palmer(Palmer) who issued the warning was to the effect that he was informed by his superior, Mr Smit (Smit) that there were irregularities. He went to enquire from certain people whether when they attended a meeting they were served with tea, coffee and biscuits. His enquiry yielded an affirmative response. Thereafter, he requested a meeting with a senior manager, Mr Pillay (Pillay). Smit and the appellant were also in attendance. At the conclusion of the meeting Pillay indicated that the finance division would take no further steps and the matter was left in the hands of Smit to finalise. The latter asked the appellant to give him a full report in writing and stated that the matter would be put to rest. Immediately, after the said meeting Palmer took the appellant to his office and “gave him a dressing down in the strongest term”. Then he proceeded to issue a written warning against the appellant without any formal inquiry. It is significant to note that Palmer stated, during the arbitration proceedings, that at the stage of the meeting and the subsequent warning, no evidence relating to the matter was given to him. Furthermore, he said they had no information indicating that fraud had been committed. Nonetheless, he hurriedly issued the warning even before the appellant could furnish a written report asked for by his superior, Smit. It should be remembered that according to Palmer, on hearing about irregularities, he took the matter to a meeting with his

superiors(Pillay and Smit) who considered it and Smit suggested that a particular step should be followed by the appellant. It is not clear from the record what prompted Palmer to take the action he took when he stated, in his evidence, that his superiors did not instruct him to take further action. The problem in this matter is that Palmer, it would appear, did not know how to discipline an employee properly. Although it may have needed a lawyer to properly interpret the facts in question i.e. did they constitute a mere irregularity or a forgery, fraud and/or theft, it was still unfair to the company to have it denied the opportunity of having the facts evaluated by its Human Resources Manager who was probably more familiar with its disciplinary code than Palmer who hastily decided to discipline the appellant even though he had insufficient information and the latter had not then furnished a written report. In these circumstances it would manifestly be unfair for the company to be saddled with a quick, ill-informed and incorrect decision of its employee who misconceived the seriousness of the matter and hurriedly took an inappropriate decision leading to an equally inappropriate penalty.

[16] It appears from the arbitration record that audit investigations were later conducted by the employer's agents who were not informed by Palmer that he had already disciplined the appellant. Those investigations revealed that the appellant was not just guilty of irregularities but that fraud, forgery and dishonesty had been committed. This led to the formal enquiry which led to the appellant's dismissal. During the subsequent arbitration, the appellant did not testify. Instead he contended that it was improper to subject him to a disciplinary enquiry because he had already been disciplined. The arbitrator upheld the contention and found the dismissal to have been unfair only on the basis that the employer was not entitled to hold the enquiry because the appellant had been disciplined and that the employer was bound by the warning given to him.

[17] Even though, strictly speaking, there was only one enquiry in the present matter, I am prepared to approach it on the assumption that there were two enquiries, as it was the position in **Van der Walt's** case, because two successive punishments were imposed. I shall further assume that the principle in **Van der Walt** equally applies to the present matter. In accordance with that principle, the employer is entitled to hold a second disciplinary enquiry if it would be fair to do so. The arbitrator's

award deviates from the aforesaid principle. Even if the test was that a second enquiry was permissible only in exceptional circumstances, the arbitrator would have still failed to, on the present facts, apply it and consider issues placed before him.

[18] The question arising for consideration is whether the arbitrator has committed a gross irregularity, which entitled the court a quo to interfere with the award. As a starting point, this court has in the past urged arbitrators to approach the employers' dismissals with some measure of caution. In **County Fair Foods (Pty) Ltd v CCMA and Others [1999] 11 BLLR 1117 (LAC) Ngcobo AJP** said at para [28]:

“[28] Given the finality of the awards and the limited power of the Labour Court to interfere with the awards, commissioners must approach their function with caution. They must bear in mind that their awards are final-there is no appeal against their awards. In particular commissioners must exercise great caution when they consider the fairness of the sanction imposed by the employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. The rationale for this is that it is primarily the function of the employer to decide upon the proper sanction.”

[19] Had the arbitrator heeded the above caution and had he appreciated the correct legal position, he probably would have come to a different

conclusion or at least he would have properly considered the real issue before him which was the fairness of the dismissal. Nonetheless that is not the test: the proper test for interference with his award, in the context of this case, is whether he has committed a gross irregularity. As stated in para [10] above, the award demonstrates that the arbitrator completely misconceived the correct legal position as currently enunciated in **Van der Walt** and he arrived at the incorrect conclusion that the holding of the “second enquiry” per se rendered the dismissal unfair. In this regard the only issue traversed by the arbitrator was whether the employer was bound by the action of Palmer in issuing the warning to the appellant. Having considered the employer’s disciplinary code, elsewhere in his award the arbitrator states:

“ The above provisions validate Mr Palmers actions entirely. There is no basis to suggest that Mr Palmer acted beyond his powers, **although his decision may have been incorrect.** The respondent is accordingly bound by Mr Palmer’s actions. The **respondents contended that Mr Palmer came to the assistance of the applicant in order to prevent him from facing serious charges.** In my view it **is unfortunate for the respondent that even if this contention is true it is bound by Mr Palmer’s conduct.** As a senior manager one would have expected Mr Palmer to exercise extreme caution when dealing with this matter because of the serious nature of the allegations. His decision to invoke discipline in the manner that he did is somewhat but not entirely mitigated by Mr Pillay and Mr Smit’s decision not to pursue the matter. It is my conclusion therefore that the applicant’s argument that he was

disciplined twice for the alleged infringements must be sustained. As a result of this conclusion it is not necessary for me to traverse all the evidence led concerning the allegations of fraud, dishonesty and forgery” [Emphasis added].

[20] Undoubtedly, the aforesaid reasoning by the arbitrator reveals, in my respectful opinion, a fundamental flaw in every step of the way towards his conclusion that the dismissal was unfair. His material reasons do not logically lead to the conclusion he arrived at (**Miladys (A Division of Mr Price Group Limited) v Naidoo & others (supra) at para [29]**). Firstly, the arbitrator was faithfully married to the idea that since it was competent for Palmer to issue the written warning, the employer was bound by the latter’s action irrespective of whether Palmer’s decision to issue a warning was correct or not and despite the possibility of Palmer having been influenced by ulterior motives to issue the warning. It would be recalled that through his own mouth Palmer stated that the information at his disposal was scanty in that he only heard from Smit that there were irregularities and further that his own investigation was confined to asking certain people whether when they had a meeting they were served with tea and biscuits. Nothing suggested the commission of offences such as fraud, forgery and dishonesty. Moreover, according to Palmer, although his superior had asked for a written report from the appellant and indicated that the matter would then be closed, on his own, he immediately issued the warning without any enquiry. Therefore, it is clear that the arbitrator held the view that if Palmer’s action in issuing the warning was binding on the employer, it was not permissible for the employer to later charge him in respect of the same conduct.

[21] As a result of the arbitrator's misconception of the law relating to the propriety of holding a second disciplinary enquiry, the employer in the present matter was denied the opportunity of having the issue of the fairness of the dismissal considered in a fair public hearing and by means of applying the relevant law. The arbitrator failed to consider whether or not in the circumstances of the present matter the employer was entitled to hold the enquiry that led to the appellant's dismissal and if so whether the sanction of a dismissal was fair. In my opinion this constituted a gross irregularity on the part of the arbitrator. The arbitrator's reasoning was so flawed and the ultimate conclusion he arrived at so unsound to the extent of constituting a gross irregularity as pronounced in **Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551**. At 560 **Schreiner J** is reported to have stated:

“ It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial they might be called patent irregularities- and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent...Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether it prevented the fair trial of the issue. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.”

This case was later approved and followed by the Appellate Division in **L.R.T.B and Another v D.C.C and Another 1965 (1) SA 586 (A) at 598.**

[22] Although the aforesaid dictum was made 65 years ago, it is consistent with the current constitutional demands as entrenched in s 34 of the Constitution which elsewhere requires, in peremptory terms, that when the courts are construing any legislation they should promote the spirit, purport and objects of the Bill of Rights. It is needless to say s 34 referred to herein forms an integral part of the said Bill of Rights. The issue of fairness occupies center stage in the said section which also affirms one of the foundational values to our Constitution. Thus in **De Beer No v North-Central Local Council etc 2002 (1) SA 429 (CC)** **Yacoob J** (writing for the court) stated at para [11]:

“ [11] This s 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair.”[Footnotes omitted]

[23] In spite of the fact that **Yacoob J** in **De Beer** referred specifically to

courts of law, s 34 expressly refers also to other impartial tribunals such as those over which arbitrators preside. See **Transport Fleet Maintenance (Pty) Ltd and Another v Numsa and Another**-yet unreported judgment of this court delivered on 6 August 2003 under Case No PA1/02-at para [23]. So, by parity of reasoning, arbitrators are obliged to ensure that proceedings before them are always fair. The parties that appear before them should equally receive a fair hearing. Once one of such parties proves successfully that it did not receive a fair hearing in the context referred to by **Schreiner J in Goldfields Investment**, then the reviewing court is entitled to set aside the award. Quite clearly the arbitrator in the present case has committed what, in the language of **Schreiner J in Goldfields Investment**, can be described as a latent irregularity in the sense that he has failed to deal with the real issues he was called upon to decide and thereby denied the employer a fair hearing. This approach was approved by this court in **Toyota SA Motors (Pty) Ltd v Radebe & Others** and **Stocks Civil Engineering (Pty) Ltd v Gip No and Another**, both of which are referred to in **Willis JA's** judgment. In **Stocks Civil Engineering** case **van Dijkhorst AJA** said at paras[53]-[55]:

“ The crucial question is whether the irregularity prevented a fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not been a fair trial. But if a mistake of law leads to a material misconception of the nature of the enquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial.

[54] The concept of irregularity in the proceedings was dealt with by the full court in *Ellis v Morgan & Desai* 1909 TS 576 at 581 which remarked that ‘an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined’. Mala fides is therefore not a prerequisite and the bottom line is : has there been a fair trial ? See also *Paper Printing Wood & Allied Workers Union v Pinaar* NO 1993 (4) SA 621 (A) at 638 H. In this case Botha JA expressed doubts whether the approach to errors in the context of common-law reviews as summarized in *Hira’s* case, can be accommodated under s24(1)(c) of the Supreme Court Act 59 of 1959 which grants power of review in the case of gross irregularity in the proceedings (at 639 D). Insofar as errors of law relate to the functions of an arbitrator, I do not share the doubts. Such errors if material amount to a gross irregularity in the sense this phrase has acquired.

[55] The meaning of the phrase “gross irregularity has therefore been widened to include patent thought processes in the mind of the arbitrator which adversely impact upon the fairness of the proceedings. It must be accepted that the legislature was aware of this when the Arbitration Act was passed.”

[24] In the circumstances I uphold the decision of the court a quo and at the same time dismiss the appeal with costs.

JAFTA AJA

I agree.

NICHOLSON JA

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Date of hearing: 10 September, 2003

Date of Judgment: 13 November, 2003