

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No.: **DA 17/2002**

In the matter between:

ASSOCIATED ADDITIVES (PTY) LTD

Appellant

and

JOHN BENJAMIN NAUDE
Respondent

First

COMMISSIONER CAHILL NO

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

Third Respondent

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JUDGMENT

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COMRIE AJA :

[1.] The first respondent (Mr. Naude) was formerly employed by the appellant company as a fitter. On 1 September 2000, at the conclusion of a disciplinary enquiry chaired by the appellant's Mr. Fountain, Naude was found to have committed gross misconduct and dismissed. An internal appeal to the company's managing director failed. A dispute arose between Naude and the appellant about the fairness of the dismissal, which dispute Naude referred to the third respondent (the Commissioner for Conciliation, Mediation &

Arbitration) for conciliation. When conciliation failed, the matter went to arbitration before commissioner Cahill, the second respondent, who dismissed Naude's unfair dismissal claim. Naude brought an application before the Labour Court to have the award reviewed and set aside. **Ngcamu AJ**, who heard the review application, held that:

“The dismissal of the applicant was substantively fair but procedurally unfair. The matter is remitted back to the CCMA for the arbitrator to consider if there should be any compensation awarded to the applicant on the basis of procedural unfairness.”

The appellant was ordered to pay the costs of the review application. The appeal is with leave granted by the Court *a quo*.

- [2.]** The stance adopted by Naude's counsel, Mr. **Nxusani**, in this Court was as follows. First, he was instructed by his attorney not to pursue the prior contention that Naude's dismissal was substantively unfair either in respect of the finding of guilt or the sanction. This accorded with his heads of argument which contained no such contention and which concluded by asking that the appeal be dismissed with costs and that the order of the Court below be confirmed. Second, Mr. **Nxusani** supported the finding of procedural unfairness on two grounds: (a) bias or partiality on the part of the chairman of the disciplinary enquiry, which counsel sought to illustrate in various ways; and (b) the chairman's failure to afford Naude an opportunity to mitigate after conviction and prior to the imposition of sanction. Counsel's stance permits a more succinct synopsis of the facts than would otherwise have been required.

[3.] On 17 August 2000, soon after 9:00 am, somebody deflated two tyres of the vehicle belonging to one Sister Pretorius which was parked on the appellant's premises. Sr. Pretorius is a nursing sister. She was not an employee of the appellant, but was contracted through a third party to provide nursing services to the appellant, for which purpose she was in regular attendance. When she drove off more than two hours later, she realised that something was amiss and stopped her car after a short distance. A report was made to her by an employee from the neighbouring factory. She in turn reported the incident to the appellant. Naude was charged with gross misconduct amounting to sabotage in connection with the deflation of Sr. Pretorius' tyres. At the first hearing of the disciplinary enquiry Naude denied all responsibility. Fountain informed Naude that according to the complaint there were eye witnesses. The enquiry was adjourned to enable them to be located and their statements taken. Mr. Lotz, of an independent security company, was appointed to investigate.

[4.] Lotz traced two eye witnesses, Messrs Cornelius and Pillay, and took statements from them. He handed those statements to Fountain together with his (Lotz's) own statement recording his investigation. At the next sitting of the disciplinary enquiry Naude, despite these statements, continued to protest his innocence. As the witnesses had indicated their willingness to give evidence in person, Fountain postponed the hearing so that they could do so. At the resumed hearing on 1 September 2000, Messrs. Cornelius and Pillay both identified Naude as the person whom they had seen kneeling next to Sr. Pretorius' vehicle at the relevant time, and at which time Naude was admittedly in the carpark. At the conclusion of the evidence, which included that of Naude, Fountain adjourned the enquiry over the lunch hour to consider the verdict.

- [5.]** On resumption Fountain delivered his verdict of guilty (with brief reasons) and forthwith imposed the sanction of dismissal (with brief reasons). It may be accepted that Naude was not afforded an opportunity to mitigate, although Fountain may have taken into account such mitigating circumstances as were known to him.
- [6.]** Naude noted an internal appeal. The appeal was heard by the company's managing director, Mr. O'Connor, and was dismissed. We do not have a record of the appeal, but from other documents and the affidavits we have some idea of what transpired. As I have already mentioned, Naude failed at arbitration, but succeeded on the basis of procedural unfairness on review of the award. I turn to consider the grounds advanced by Mr. **Nxusani** in support of the judgment of the Court below.
- [7.]** With regard to the first main ground – bias or partiality – it should be noted that the merits of Naude's conviction were not re-tried *de novo* before the commissioner. This seems to have been a matter of policy adopted by the parties. Neither before the Court *a quo*, nor before this Court, was the case advanced for Naude that there should have been a complete re-trial. What actually happened was that the commissioner in effect sat in quasi-review of the disciplinary enquiry; a transcript of those proceedings was placed before him together with some oral evidence. At the arbitration attention was concentrated on the conduct of the disciplinary enquiry and its chairman. The matter in the Court *a quo*, however, was a review of the commissioner's award and not of the disciplinary enquiry. The focus changed. The true issue before **Ngcamu AJ** was not whether the chairman of the disciplinary enquiry

was biased or partial, but whether the conclusions of the commissioner in this connection were reviewably wrong. It seems to me that Naude's founding affidavit scarcely made out a case in this respect. I intend nonetheless to consider counsel's submissions since, on the restricted basis indicated earlier, the matter was fully argued.

BIAS OR PARTIALITY

[8.] Counsel relied firstly on an altercation between Fountain and Naude shortly before the tyre incident. It related to events which may have sparked that incident. It appears that Naude was sent home to shave the stubble off his chin, and that this accounted for his presence in the carpark at the relevant time. In terms of a recent company ruling, employees who wore protective masks (such as Naude) were required to be clean shaven for health reasons. Naude resented the ruling which he erroneously blamed on Sr. Pretorius. It was on the subject of the stubble and the masks that Naude and Fountain had words or an exchange which Naude describes in his affidavit as "heated". Fountain regards that description as exaggerated. It emerged at the arbitration, however, that at the internal appeal hearing Naude had apologised to Fountain for the allegation of bias. There is some dispute as to the ambit of the apology, but it is clear that it at least referred to the suggestion of bias following upon the altercation. In the circumstances it seems to me that there is no real substance in counsel's first point.

[9.] Counsel's second point was that Fountain played the roles of investigator, prosecutor and judge all at the same time, and that this was contrary to fundamental tenets of fairness. This is essentially the first ground upon which

the Court *a quo* found procedural unfairness and overturned the arbitrator's award. It should be borne in mind that this was not a trial in a court of law, but a disciplinary enquiry conducted by a layman. Fountain's investigative role was minimal. He was aware from the terms of Sr. Pretorius' complaint that there were said to be two eye witnesses. When the charge was put to Naude, he denied guilt. There was in my opinion no requirement that a dossier, replete with witnesses' statements, should have been available at that stage. I think it was in order to put the charge to Naude, at the first hearing, so as to elicit a response. Naude might have admitted guilt. But when he denied responsibility, and made it clear that he denied interfering with the Sister's vehicle in any way, Fountain properly postponed the matter for further investigation. Wisely, Fountain did not pursue that investigation himself, but caused it to be undertaken by an independent third person, Lotz.

[10.] Fountain saw the statements taken by Lotz, as well as Lotz's own statement. Copies were given to Naude and his representative at the second hearing. Naude's reaction thereto was elicited. When Naude persisted in denying guilt, Fountain concluded that there was a case to meet and that the two eye witnesses should be called to give evidence. I cannot fault either conclusion. Having read the statements of Cornelius and Pillay myself, I am satisfied that there was a case to meet. Furthermore, to have tried the matter on those statements, without hearing their evidence in person, would have been disastrous. The postponement was unavoidable in the circumstances. Fountain did not interview these two witnesses before they gave their evidence at the adjourned hearing. Fountain's investigative role is above criticism.

[11.] Mr. **Nxusani** submitted further that Fountain also acted as prosecutor. It is true that there was no *pro forma* prosecutor as one would have in a criminal trial. There can be no general rule that a designated prosecutor is required in every disciplinary enquiry; the need or otherwise must depend on the circumstances of the case. Where there is no separate prosecutor, the chairperson should take care not to muddle the roles. A measure of intervention is permissible, as in a trial, provided the chairperson does not assume the prosecutor's mantle. I have studied the record of the enquiry in the present matter which, though not verbatim, appears to be a fairly full summary of what occurred. It is evident that Fountain, as chairman, kept a firm hand on the proceedings, and was intent on focussing on the essentials. Hence his rulings on permissible evidence and cross-examination. I do not gain the impression, however, that Fountain descended into the arena or otherwise assumed a prosecutorial role. In any event it must be borne in mind that a disciplinary enquiry is not a court hearing. What is important is that the employee must be given a fair opportunity to present his case before a decision is taken which may affect him adversely.

[12.] I conclude that Fountain cannot be said in any real sense to have acted at one and the same time as investigator, prosecutor and judge. If he did, his conduct was of such a nature that it did not result in the employee being deprived of a fair opportunity to be heard. The inference of bias or partiality accordingly falls away.

[13.] Mr. **Nxusani** relied on two other supposed improprieties which he submitted were suggestive of bias. They were that Fountain saw the statements of the witnesses before they testified and that he "consulted" with Lotz. In my opinion there was no harm in Fountain seeing the statements in advance. He needed to know whether the two eye witnesses from the factory next door were of any potential value. If not, there would have been no point in calling them. The statements of Cornelius and Pillay were in any event put in as evidence and the two men were cross-examined on them. There was no

material irregularity, let alone one indicative of partiality. The alleged consultation with Lotz is difficult to fathom, as it was not canvassed in the evidence before the commissioner or the Court *a quo*. The only reference that I can find to it is in Naude's appeal document under the date 23/08/2000. It reads:

"Rod Fountain informed me that he had contacted Shield Security to investigate the matter as it was a reliable Company.

I saw Peter Butler, Rod Fountain and E. Lotz talking to each other. I presumed that it was about the case."

Under the date 29/08/2000 Naude wrote:

"I saw Mr. E. Lotz hand Rod Fountain a brown envelope."

[14.] The 23rd of August was the date upon which Lotz was commissioned to undertake the investigation. Butler was an employee of the appellant who assisted Lotz. It can safely be inferred that the conversation was about the proposed investigation and not about its outcome. We know from elsewhere in Naude's own document that the brown envelope contained the statements of Lotz, Cornelius and Pillay. There is accordingly no question of an improper consultation between Fountain and Lotz.

[15.] For the sake of completeness I mention a further suggested impropriety (not linked to bias) raised in counsel's heads of argument but not during his address. It is that the complainant, Sr. Pretorius, was given copies of the witnesses' statements. However, this occurred when she gave her evidence

and not beforehand. Having perused the statements she verified their contents as far as her knowledge went. She then gave her own evidence. There is no semblance of an irregularity here.

[16.] Finally, on this leg of the case, Mr. **Nxusani** asked us to have regard to the impression created by the whole disciplinary process and not merely to the individual constituent criticisms. The insuperable difficulty in the way of this approach in the present case is that I can find no real substance in any of the constituent criticisms which counsel advanced on appeal. In any event, save in the respect still to be considered, my overall impression is that practical justice ran its course.

[17.] It appears to me that the Court *a quo* erred fundamentally in upholding this first ground of procedural unfairness. It set norms and rules more appropriate to a fully fledged criminal trial than to a disciplinary enquiry in the workplace. I have analysed above the several criticisms laid at Fountain's door and found each of them to be unsustainable. The evidence before the Court below, assessed in the light of appropriate norms and rules, does not in my view rationally justify the conclusion at which the learned Judge arrived.

OPPORTUNITY TO MITIGATE

[18.] The disciplinary enquiry adjourned over the lunch hour to consider its verdict. When it reconvened, Naude was convicted and then immediately sanctioned (i.e. dismissed). He was not afforded an opportunity, prior to the imposition of the sanction, of mitigating his position by way of evidence or argument. Mr. **Nxusani** submitted that such omission constituted procedural unfairness. There is, however, more to the story. When Naude appealed internally, the absence of an opportunity to mitigate does not appear to have been one of

his complaints. The appeal was heard by Mr. O'Connor, the managing director. In the appellant's opposing affidavit in the Court below the following is stated at para. 61:

"The Second Respondent avers that when the appeal Chairman brought to the Applicant's and his representative's attention the "mitigating circumstances" clause he was advised by the Applicant's representative that the Applicant "was not prepared to go this route"."

This drew the following reply from Mr. Naude:

"Ad paragraph 61

I was not prepared to go this route because we told the

Appeal Chairman that I did not commit the infraction."

[19.] Consistently herewith the absence of an opportunity to mitigate was not one of Naude's complaints at the arbitration. The omission was elicited by the commissioner, it would seem as part of a check- list. Since it was not a complaint as such, Fountain did not deal with it, nor was he asked by the commissioner to do so. Had the issue been raised as a complaint, we know in retrospect what the appellant's answer would have been. In his award the commissioner said:

"Once the chairperson of the disciplinary hearing had come to a conclusion based on a balance of probabilities, he would have then considered the aggravating and mitigating circumstances."

It is difficult to perceive on what evidence this conclusion was based, because the issue was not canvassed with Fountain.

[20.] In the review application Naude took the matter further . He alleged that the appellant had failed inter alia to take into account: (i) his long service record; (ii) his exemplary service; and (iii) any mitigating factors. Naude also attacked the commissioner's finding quoted above and stated that: "the chairperson made no reference to the aggravating and mitigating circumstances when he gave his judgment". In its opposing affidavit the appellant claimed that Fountain did take mitigation into account, including Mr. Naude's service record and exemplary service. The appellant did not claim that Naude had been afforded an opportunity to mitigate. Its answer instead was that quoted earlier, namely that Naude had been given the opportunity on appeal but had declined "to go this route". This was admitted in reply by Naude. This part of the evidence appears to have been overlooked by the Court below.

[21.] The Court *a quo* held:

"The perusal of the record as well reveals that the applicant was not afforded any opportunity to present mitigating factors at the time of the hearing. The chairperson did not indicate what he took into account in arriving at the sanction that he imposed on the applicant. The arbitrator, however, found that on a balance of probabilities the chairperson would have considered aggravating and mitigating circumstances. In my view this

was an assumption by the arbitrator. There is no basis for this conclusion in the absence of any evidence either on the record of the arbitration hearing or also on the record of the disciplinary hearing. What appears is that the chairperson found the applicant guilty and then imposed a sanction without any chance to mitigate on the part of the applicant. The chairperson should have given the applicant an opportunity to present his case on mitigating factors and this was not done. There was in my view no rational basis justifying the conclusion that the mitigating circumstances were taken into account by the chairperson.”

[22.] I shall assume that Fountain, when deciding on the appropriate sanction, took into account such mitigating circumstances as were known to him. I agree that that was insufficient. There may have been circumstances, unknown to Fountain, that could have been urged upon him by Naude or his representative. Moreover, Naude or his representative may have been able in argument to present known circumstances in a different and persuasive light. The failure to afford Naude an opportunity to mitigate prior to the imposition of the sanction of dismissal appears to me to have amounted to procedural unfairness. But that all changed on internal appeal before O'Connor when Naude declined the opportunity to advance mitigation. The earlier unfairness was rectified. Compare *Johnson & Johnson (Pty) Ltd v. CWIU* [1998] 12 BLLR 1209 (LAC) at 1210 I.

[23.] As I have already said, this last mentioned aspect of the matter appears to have escaped the attention of the Court *a quo*. There is no reference to it in the judgment, and there is not even a passing reference to *Johnson's* case or

to the principle there laid down. I have little doubt that had **Ngcamu AJ** addressed this ground of procedural unfairness in the light of all the evidence, including the evidence relating to the internal appeal, he would have reached a different conclusion. His finding , quoted earlier, cannot in the circumstances be allowed to stand.

CONCLUSION

[24.] It follows from what I have said that the appeal must succeed with costs. The order granted by the Court *a quo* is set aside and replaced by an order that:

“The application is dismissed with costs.”

R.G. COMRIE
Acting Judge of Appeal

I agree.

R.M.M. ZONDO
Judge President

I agree.

M.T.R. MOGOENG
Judge of Appeal

APPEARANCES:

For the appellant : **Adv. K.C. McIntosh**

Instructed by : **Shepstone & Wylie, Durban**

For the 1st Respondent : **Adv. J. Nxusani**

Instructed by : **Pungi Pillay & Associates, Rossburgh**

Date of hearing : **4 June 2003**

Date of judgment : **20 November 2003**