

## In the matter between

**Appellant**

**and**

### 1<sup>st</sup> Respondent

## 2<sup>nd</sup> Respondent

## 2<sup>nd</sup> Respondent

### 3<sup>rd</sup> Respondent

## JUDGMENT

DAVIS AJA

## Introduction

- [1] First respondent applied to the Labour Court in terms of section 145 of the Labour Relations Act 66 of 1995 (**‘the Act’**) for the setting aside of an arbitration award issued by third respondent in his capacity as a commissioner of second respondent, the Commission for Conciliation, Mediation and Arbitration

(“CCMA”), on 27 November 2000. The application was launched on the 1<sup>st</sup> February 2001 and was eventually heard by Barrie AJ on 14 March 2003. Judgment was delivered on 30 May 2003 in terms of which the award was set aside and remitted to the third respondent for hearing subject to certain directions. With the leave of the Court *a quo*, appellant now appeals against the judgment.

### **Factual Background.**

- [2] First respondent was dismissed on 22 September 1999 after a disciplinary enquiry convened by appellant pursuant to which he had been found guilty of two acts of misconduct. The one allegation of misconduct was that he had left work without authorisation. For this act of misconduct he was given a written warning. The other allegation of misconduct against the first respondent was that on 5 April 1999 he had intimidated his superior, a Mr Reinecke, by threatening to kill him. For the act of intimidation he was dismissed. The first respondent was said to have committed these two acts of misconduct on the same day.
- [3] First respondent noted an internal appeal against these findings. The chairman of the appeal hearing confirmed the finding of the disciplinary enquiry, save that it decided to increase the sanction for the unauthorized absence from work to summary dismissal. The effect of this is that the first respondent had two sanctions of dismissal imposed upon him, one for the misconduct of absence from work without authorisation and the other for intimidation. First respondent disputed the fairness of his dismissal and referred the dispute to, initially, conciliation and, later, arbitration in terms

of section 191 of the Act. A strange feature of the arbitration proceedings is that, in the first page of the arbitration award, the third respondent recorded that the parties agreed in a pre-arbitration conference that **“the only issue in dispute was whether the [first respondent’s] dismissal for alleged intimidation was substantively fair.”** None of the parties has said that this does not reflect what they agreed. I say that this is a strange feature because the parties left out of the arbitration process the fairness of the sanction of dismissal that was imposed upon the first respondent by the chairman of the internal appeal hearing for the misconduct of absence from work without authorisation. The effect of this agreement would be that, even if the first respondent was found not to have been guilty of the misconduct of intimidation, it would not be permissible to order his reinstatement because the dismissal for the other misconduct would still stand. It may well be that the parties have a private agreement about what would happen to that dismissal if the first respondent was found not guilty of intimidation. For that reason the matter might not be academic. The matter was heard by third respondent who found that the dismissal of first respondent was substantively fair and that dismissal was indeed the appropriate sanction.

- [4] The first respondent sought to justify his finding in the following terms in his award. **“The applicant through his representative has admitted the commission of the offence at the disciplinary inquiry to stating that ‘Mr Koai’s (applicant) intimidation was because no one was able to help him, even when he stated his reasons and Mr Reyneke, the supervisor of personnel, could not help.(as per page 7 on annexure ‘C’)”**

**“The applicant was aware of the department’s disciplinary procedure and given the length of his service and that the fact that he was a member of the Police and Prisoners Civil Rights Union, he ought to have known the correct and proper channels to utilize in challenging an unreasonable denial to obtain permission to leave.**

**Having evaluated the parties evidence above, I must now decide whether the dismissal was substantively fair or not, as alleged by the applicant.**

**In my view, the applicant’s admission brings the enquiry to an end. The applicant has breached the company rule and he knew about the rule and in terms of the department’s disciplinary code dismissal is applicable sanction for breaching the rule.**

**Therefore, following from my views expressed above, I find that the applicant’s dismissal was substantively fair. All the facts which are immaterial and irrelevant have been omitted.”**

- [5] Accordingly, the third respondent's award was that the first respondent's dismissal was substantively fair and he dismissed the unfair dismissal claim.
- [6] First respondent then instituted review proceedings in which he contended that third respondent had been biased, that he had failed to apply his mind fully to the matter and had ignored relevant evidence led by first respondent. In a supplementary affidavit first respondent contended that third respondent's finding had been 'bizarre unreasonable and unjustifiable in so far as (he) failed to apply his mind fully to the evidence before him.'
- [7] Barrie AJ, who heard the review application in the Labour Court, found that there was no basis on the evidence to conclude that first respondent or his representative had conceded that intimidation had taken place. Accordingly, he found that third respondent had erred in reaching such conclusion. The Court a quo thus found that third respondent had relied heavily on this incorrect and irrelevant factual premise, and accordingly, the award was **"not objectively justifiable in relation to the reasons given for it and it should potentially be reviewed and set aside"**.

### **The Appeal**

- [8] Mr Vally, who appeared on behalf of appellant, submitted that a careful evaluation of the award by third respondent revealed that he had identified the issues and assessed the evidence in a fair, balanced and impartial manner. In support of this contention Mr Vally referred to the extract from the third respondent's award that

has been quoted in paragraph 4 above. It is not necessary to quote it again.

- [9] Mr Vally also referred to the following passage from the transcript of the disciplinary hearing:

**‘ Mr Maloka said Mr Koai’s intimidation was because no one was able to help him even when he stated his reasons and Mr Reyneke supervisor of personnel couldn’t help’.**

- [10] A further aspect of Mr Reyneke’s testimony to which Mr Vally referred read as follows:

**“What happened on that day, 5 April 1999? At 0.30 that morning I have put, visiting room, I was at the main gate at that moment to sign for the keys. ... And while I signed for the keys Mr Koai was standing in the doorway ... the main gate but he said to me, I’m going to kill you .... Shoot you and your...”**

Mr Vally argued that this evidence was not contradicted nor challenged during cross examination.

### **Evaluation.**

- [11] An examination of the award by third respondent reveals that he carefully analyzed all of the evidence of each witness before proceeding to **‘an analysis of evidence and argument’**. Admittedly, this section of the award is thin as is the concluding paragraph: **‘in my view the applicant’s admission brings an end to an enquiry. The applicant has breached the company rule**

and he knew about the rule in terms of the department's disciplinary code is the applicable sanction for breaching the rule (sic)'

[12] The critical question for determination is whether the decision arrived at by third respondent is justifiable. In **Carephone (Pty)ltd v Marcus NO and others (1998) 19 ILJ 1425 (LAC)** this Court held that section 145(2)(a)(iii), which is the provision that says that that an arbitration award may be set aside where a commissioner exceeded his powers, incorporated the constitutional requirement that administrative action be justifiable in relation to the reasons given for it. In formulating the test of justifiability in that case Froneman DJP said: **'It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she arrived at?'** (at para 37).

[13] In **Crown Chickens (Pty)Ltd t/a Rocklands Poultry v Kapp and others (2002) 6 BLLR 493 (LAC)** at 508 H-I Nicholson JA provided further guidance as to the meaning of 'rational connection' when he said **"By rational I understand that an award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guess work or hallucination"**. He later continued thus: **'Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in**

**every respect but as regards the important logical steps on the road to his order’.**

[14] In summary, it would appear that the essence of the test for justification concerns an enquiry as to the presence of a rational connection between the decision taken, the facts upon which such decision is based and the reasoning provided for the decision, which provides evidence for the presence of the requisite rational connection.

[15] In this case, the evidence on the record as well as the evidence summarized by the third respondent in his award provides a clear justification for a conclusion that appellant had engaged in an act of intimidation towards his superior, Mr Reyneke. The only argument available to first respondent and the one which was accepted by Barrie AJ is that the decision was justified only on the basis of an alleged concession by appellant’s representative. It was argued on behalf of the first respondent that no such concession had been made. In my view, however when one examines the evidence as summarized by third respondent in his award, there was a rational connection between the decision taken and the facts on which such decision was based. Were it incumbent on this Court to engage in a painstaking deconstruction of the express reasoning provided for a decision in circumstances where there was a clear, rational connection between the decision taken and the facts on which the decision was based, many awards would be set aside, simply because the decision of the arbitrator was not expressed with the linguistic precision and elegance which a court might require itself. That on its own is an inadequate reason for the



contention that the ultimate decision arrived at by the third respondent was not justifiable.

[16] Mr Vally submitted that, were the appellant to be successful, it did not wish to pursue a cost order against first respondent.

[17] In the result I make the following order:

1. The appeal is upheld.
2. The order of the Court a quo is set aside and replaced with the following one:-

“1. **The application is dismissed.**”

Davis AJA

I agree.

Zondo JP

I agree.

Jappie AJA

Appearances:

For the appellant : Adv B Vally

Instructed by : State Attorney

For the respondent : Adv G Malindi  
Instructed by : Lebea & Associates  
  
Date of judgment : 28 February 2006