

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No: JA26/2003

In the matter between

I.A.M SEMENYA SC

1ST

APPELLANT

I. V MALEKA

2ND

APPELLANT

L. T SIBEKO

3RD

APPELLANT

L. J. BOKABA

4TH APPELLANT

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1ST

RESPONDENT

TSHILA MONYAI NO

2ND

RESPONDENT

H. N HLATSWAYO

3RD

RESPONDENT

JUDGMENT

ZONDO JP

Introduction

- [1] This is an appeal from a judgment and order of Waglay J sitting in the Labour Court. In terms of that judgment Waglay J dismissed an application that had been brought by the appellants against the respondents to have an arbitration award that had been issued by the second respondent under the auspices of the first respondent in favour of the third respondent reviewed and set aside. The arbitration award was to the effect that, although the appellants' dismissal of the third respondent was for a fair reason, it was procedurally unfair. In terms of that award the appellants were ordered to pay the third respondent compensation equivalent to the amount of remuneration that she would have been paid for the period from the date of dismissal to the last date of the arbitration hearing. Waglay J refused the appellants leave to appeal. They then petitioned the Judge President of this Court. This Court granted them leave to appeal; hence this appeal. Before I can consider the appeal, it is necessary to set out the background to, and the relevant facts of, this matter.

The facts

- [2] The facts that need to be set out in this matter are those that are relevant to the finding of the second respondent that the appellants' dismissal of the third respondent was procedurally unfair. I do not have to set out any facts relevant to the finding that the third respondent's dismissal was for a fair reason because that finding

has not been challenged by the third respondent.

- [3] The appellants are all advocates by profession and practise as such as members of the Johannesburg Bar. The first respondent is the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”) under whose auspices the arbitration proceedings which are the subject of these proceedings were conducted. The second respondent is a commissioner of the CCMA who issued the arbitration award which is the subject of these proceedings. The third respondent is a former employee of the appellants who was party to the dismissal dispute that resulted in the arbitration award.
- [4] The third respondent was employed as a personal assistant/secretary, initially by the first and second appellants only but, later, also by the third and fourth appellants. Her employment with the first and second appellants commenced on 1 June 1999. The events that are relevant to the commissioner’s finding on procedural fairness occurred during the last eleven days of July 2000 and during August 2000. It is common cause among all parties that on the 21st July 2000 the third respondent was called to a meeting with the appellants or at least some of the appellants. The first and second appellants were definitely present in that meeting. The third respondent’s version is that in that meeting she was informed that her contract of employment was being cancelled which she regarded as dismissal. She testified that this came as a shock to her. She testified that she pointed out to the appellants who were present that no pre-dismissal procedure had been

followed before she could be dismissed. She says that she requested that the meeting be postponed to the following week when she would respond to what the appellants had told her.

[5] On the appellants' version it seems that they said one of two things at that meeting. Either they told her that they intended to cancel her contract of employment or they told her that her contract of employment was being cancelled. I am prepared to assume in the third respondent's favour that the appellants who met her on that day informed her that her contract of employment was being cancelled. If that is what she was told, that means that she was being dismissed. It is common cause that, after she had been told either that the appellants intended to cancel her contract of employment or that it was being cancelled, her response was to protest that no proper procedure had been followed.

[6] It was the evidence of both the first and second appellants that, pursuant to the third respondent raising the point that no proper procedure had been followed, they offered that a proper procedure be followed. It was also their evidence that they offered that an independent party of the third respondent's choice be appointed to chair her disciplinary hearing. It is not very clear whether the proposal of a third party of the third respondent's choice chairing a disciplinary hearing was made on the 21st July or the following week. However, it does not seem to me that it matters when the proposal was made. What matters is the fact that it was made and what the third respondent's response thereto was. The appellants

testified that they chose this route because, as they were all lawyers, they did not want to be seen to be taking advantage of the third respondent. In support of this, they referred to the fact that, when a written contract of employment had to be prepared that would govern the employment relationship between them and her, they had given her freedom to come up with a written contract that contained the terms and conditions of employment that she desired. To this end, the first and second appellants had allowed her to consult whoever she wanted to consult and have the contract drafted. They testified that the draft written contract that she came back with to them at the time is the one that is part of the record in this matter. They said that it contained terms and conditions of employment which she decided upon and they signed it with hardly any amendment.

[7] The first and second appellants' evidence was that the meeting of the 21st July 2000 was postponed to the following Thursday in order to enable the parties to discuss the procedural fairness point that the third respondent had raised and for her to respond to their proposal of a disciplinary hearing that would be chaired by an independent person of her choice. The third respondent testified that the purpose of the adjournment was to give her an opportunity to reflect on what the appellants had said to her and tell them her reaction at the meeting of the following week.

[8] It seems to me that it is common cause that either on the 21st July or at the meeting of the following week the third respondent was

offered by the appellants a disciplinary hearing which the appellants proposed would be chaired by an independent person of her choice. It is also common cause that she did not accept this offer. The appellants say that she spurned the offer. She says that she did not spurn it but simply said that they could do as they pleased. The appellants admit that she said that they could do as they pleased. In my view the effect of the third respondent's answer was to reject the appellants offer because the appellants could not set up a disciplinary inquiry chaired by an independent person of the third respondent's choice without her consent. Accordingly, her attempts to say that she did not reject that offer must be rejected. She rejected it very decisively.

- [9] In her evidence in the arbitration the third respondent said at some stage:

“at the meeting of the 27th I informed the advocate that they would proceed with whatever they feel would [be] right for them but as far as I am concerned, this is a dismissal because in the previous meeting of the 21st July they said that they are cancelling my agreement and they said to me that (inaudible) or should they give me R8500, 00 as my notice period. Then I said to them it is not for me to decide, as far as I am concerned, I have been dismissed. They would decide what they want to do”.

- [10] In his evidence the second appellant was asked whether a

disciplinary inquiry was held with regard to the third respondent's absenteeism. This was a reference to the fact that the third respondent had stayed away from work for a long period without permission. The second appellant answered that none had been held. He was asked why and his answer was: **"We offered it and she declined it"**. He was asked to state when she had declined it. He answered: **"The second meeting, she said that she was not interested and that we can do whatever we want"**. Counsel for the third respondent then asked the second appellant: **"So basically no procedure was followed?"** The second appellant answered: **"I told you that I believe that we followed the right procedure"**.

- [11] When later the second appellant was asked under cross-examination whether it was actually the third respondent who had to tell the appellants what procedure should be followed, he gave this explanation for their approach to the matter of procedure after the third respondent had raised her concern about procedural fairness:

"Yes Mr Arbitrator I think you will recall that we did tell you that because of the fact that we are lawyers, we did not want to lead the applicant on legal issue even then, which should indicate that we were imposing our views on her and it was for that reason that we said to her, go and draft a contractual agreement which you think is best for you and we will be guided by your own wishes and she did that. She went [to] seek assistance and she drafted a document which you find on pages

1 to 8 and signed it, without amendments and it was in that tone and of the understanding that we requested her or offered to choose what she believe was the right procedure and discuss that right procedure with us”.

[12] Later on, the second appellant, still under cross examination, said:

“Yes, I did indicate and I will repeat it again, that at the meeting the (third respondent) indicated [to] us that she is not interested in accepting our offer and that we must do whatever we want to do”. Again later the second appellant said:

“All I can say is, she confirmed that she declined our offer to follow the procedures and that we must do whatever we want to do.”

When the commissioner asked the second appellant certain questions of clarification, the second appellant once again explained thus:

“Let me say this Mr Commissioner. First we expected the employee to report to us the reason for her absence and she did not do that. Secondly we convened a meeting where we had hoped that she will explain to us her absence and she did not do that. Next we agreed to follow the procedures and hold a meeting, a subsequent meeting, where those procedures would be put on case by agreement between the employer or group of employers and the employee and that, when the meeting takes place, the employee tells us that she is not interested in the

following [of] those procedures.”

[13] In the subsequent application brought by the appellants in the Labour Court to review and set aside the commissioner’s award, the appellants also dealt with the issue of procedural fairness and how the commissioner had dealt with that issue in his arbitration award. The third respondent also dealt with that issue in her opposing affidavit in the review application.

[14] It is interesting to note that in paragraph 10.3 of her answering affidavit in the review application, the third respondent said that at the meeting of the 21st July 2000:

“I was informed of the aforesaid intention to terminate my employment that no reason was furnished for same at that stage. I was informed that it was better to do things this way before they get ugly”.

In par 10.4 of the answering affidavit the third respondent went on to say:

“I indeed did indicate to the (appellants) present that proper procedure was not followed and that I should be furnished with reasons for the dismissal and that dismissal should be effected by way of proper procedure, which is required that a disciplinary hearing be conducted prior to a dismissal. The appellants indicated that I was not being dismissed but that my contract was merely being cancelled.”

In par 10.4 of her answering affidavit the third respondent said in part:

“On the 27 July 2000 I initiated a meeting with

(Appellants) which was attended by [First, Second and Third Appellants] I indicated to the appellants that they should go ahead as they deem fit but as far as I am concerned, I was being dismissed in an unfair manner and their conduct constituted an unfair dismissal”.

[15] In the evidence led in the arbitration the third respondent disputed the evidence of the first and second appellants that she was offered a disciplinary hearing that would be chaired by an independent person of her choice. However, in par 14.2.4 of her answering affidavit in the review application she made it clear that such an offer had been made to her by the appellants. There she said:

“[Appellants] offer to have the matter resolved by an independent person of my choice was merely lip service, as the decision to terminate my employment contract was already arrived at before the 21 July 2000. I already suspected at that stage that any indulgence in this regard by [appellants] was merely an attempt to justify a dismissal which was in their favour and was premeditated.”

What is interesting is that in the arbitration the third respondent did not say what she said in the last sentence of the extract just quoted nor did she say that their offer was “**merely lip service**”. This is important because at that stage she could have been cross-examined on this issue.

The arbitration

[16] The commissioner found that the dismissal was for a fair reason

but was procedurally unfair and ordered the appellants to pay her compensation. The commissioner took the view that, when the third respondent informed the appellants that they should do as they pleased, they should have proceeded to hold a disciplinary hearing in accordance with Schedule 8 to the Act, i.e. the Code of Good Practice: Dismissal. He said that her attitude to the appellants' offer of a disciplinary inquiry chaired by an independent chairperson of her choice did not justify their not holding a disciplinary inquiry.

Proceedings in the Labour Court

- [17] With regard to the issue of procedural fairness, Waglay J adopted exactly the same attitude as the commissioner and said that the appellants should have proceeded to hold a disciplinary inquiry when the third respondent said that they should do as they pleased. Waglay J said at some stage in his judgment:

“ The employers evidence demonstrate that the decision to dismiss was already a fait accompli on the 21st July 2000, the adjournment of the meeting was not for employer to correct or how it was going about to effect dismissal but to see what the third respondent comes up with and deal with the issues the third respondent raises, this would include that the employer would have, if the third respondent so required, hold a disciplinary inquiry. The above is the only logical inference that can be drawn

from the evidence at the arbitration”.

Waglay J went on to say:

“It is not for the employee to advocate what process the employer must follow to effect his or her dismissal, the [third] respondent’s attitude on the 27 July 2000 is therefore understandable and acceptable. It was for the employer to state that it was proceeding with a misconduct inquiry and not to assume or presume that the offer in setting up such a process would be futile”.

As already stated above, Waglay J dismissed the review application.

The appeal

[18] One of the grounds upon which the appellants attacked the commissioner’s award was that his finding that the dismissal was procedurally unfair was unjustifiable. The appellants contended that they had offered the third respondent a fair hearing that would be chaired by an independent chairperson of her choice and she had rejected that offer. They contended that in those circumstances they could not go ahead with a hearing in which she had no interest. They submitted that in those circumstances she could not complain that there had been no hearing.

[19] During argument in the arbitration the first appellant dealt with, among others, the issue of procedural fairness in this case. Among other things he argued to the commissioner:

“it cannot seriously be argued that the [third respondent’s] clear message that she would not participate in [the] process, that the law

would require the [other] party to go through the process merely to comply with form”.

Later he went on:

“the purpose is that there would be a bona fide participation in the case re procedural fairness is that incontestable evidence is that the [third respondent’s] was not prepared to be a party to it and we think there are authorities that would support us to say in such a (case), it cannot lie in her mouth to cry out for what she contends to be procedural non – compliance”.

- [20] There can be no doubt on the evidence that the appellants did offer the third respondent a disciplinary hearing that would be chaired by an independent chairperson of her choice. That means that the appellants were quite prepared to have a situation where none of them chaired the disciplinary inquiry. It is not even that they wanted to appoint someone that they perceived to be independent and impartial. They wanted to ensure that there was complete fairness. Accordingly, they said to the third respondent in effect: **“Let there be a disciplinary inquiry that will not be chaired by any one of us. Let it be chaired by an independent chairperson and let’s have that chairperson chosen by you”!** The third respondent’s contention was that that offer of an opportunity to be heard was not good enough because it came after the appellants had made the decision to dismiss her. It was submitted on her behalf that there were no circumstances justifying the appellants’ failure to afford her such an opportunity before they could take the

decision. That being the case, contended the third respondent, the commissioner and the Court *a quo* were correct in reaching the conclusion that they each reached on procedural fairness.

[21] The third respondent's contention that the opportunity to be heard was not good enough because it was offered after the decision to dismiss her had been taken requires close examination. It is not our law that an opportunity to be heard that is given after the relevant decision has been taken is never good enough. Although generally speaking such an opportunity should be given before the decision can be taken, there are circumstances where an opportunity to be heard that is given after the decision has been taken is acceptable. Where the opportunity to be heard is given after the decision has been taken and it is one of those situations where it is acceptable and the person concerned spurns that offer or does not make use of it, it cannot lie in such person's mouth to say that he was not given an opportunity to be heard. In such a case an opportunity to be heard has been given and rejected. The *audi alteram partem* rule has been complied with in such a case.

[22] I do not propose to set out a list of situations where an opportunity to be heard that is given or offered after the decision has been taken is acceptable. Probably it is not advisable to attempt to give an exhaustive list of such situations. However, it seems to me that, where it can be said that the opportunity to be heard that is given after the decision has been taken is no less fair than the opportunity that should have been given before the decision could be taken, it

ought not to make a difference that it was offered after the event. In this regard I have in mind that the basis for the proposition that the opportunity to be heard should be before the decision can be taken is that, once the decision has been taken, it may be difficult for the decision-maker to change his mind even when the representations made to him by or on behalf of the affected person are such that his decision should be one favourable to the affected person. However, where the opportunity to be heard is offered after the decision has been taken but the person who will consider the representations and decide on whether the decision should be in favour or against the affected person is a different person from the one who initially made the decision and is independent of him or his organisation and can act impartially and make a fresh decision on the matter, there is no reason in principle why an opportunity to be heard given after the decision had been taken should not be accepted as satisfying the audi alteram partem rule. It seems to me that in such a case that opportunity to be heard satisfies the audi alteram partem rule because, though given after the decision, it is as fair as, if not in fact fairer than, the opportunity that should have been given before the decision.

- [23] If an opportunity to be heard that is offered after the decision has been taken is that fair, the affected person is not prejudiced, and if he, nevertheless, spurns that offer, he ought not to be allowed to complain. Let me give an example. A foreigner commences business in South Africa and employs a number of employees. Within the first two or three months he is unhappy with the

conduct of one of the employees. He dismisses him without first affording him a hearing. He is then told that the dismissal is procedurally unfair because in South Africa an employee has a right to be heard before he can be dismissed. He then says that he did not know that and offers that there be a hearing which will be chaired by a person that both he and the employee can agree upon and that person will make the decision whether the employee is guilty of misconduct and, if so, whether dismissal is an appropriate sanction in that case. That opportunity to be heard that that employer will be offering is, without doubt, either as fair as, or even fairer than, the opportunity to be heard that the employee was entitled to be afforded before the decision was made. Why should such an obviously fair opportunity to be heard not be good enough simply because it was offered after the decision had been taken? I cannot see any reason why that should be so.

- [24] It is true that, where a person or official has made a decision and only hears the other party after the decision has been made, he may well be inclined not to change the decision that he has already made. That is why the general rule is that the opportunity to be heard should be before the decision can be made. However, that concern does not arise where another person – particularly if he is independent of the first one – hears the representations of the affected person and makes a fresh decision on the matter.
- [25] It may be argued that in the example I have given, the fact that the opportunity to be heard is given after the decision has been taken is

understandable because the employer is a foreigner and is unfamiliar with the laws of our country. It would be argued that this is different from a case such as the present one where the employers are lawyers who are in practice. My answer to this is: provided the opportunity to be heard that they offer after the decision is as fair as, or, even fairer than, the opportunity to be heard that she was entitled to before the decision and a fresh decision can be taken, that is good enough. In my judgement in such a case it matters not that the employer may not have had any acceptable explanation for not giving the opportunity to be heard before the decision. Form must not be observed for its own sake. Effect must be given to substance. Accordingly, I am of the view that, if a person was offered such an opportunity to be heard after the decision had been taken and he spurned such an offer simply on the basis that it was made after the decision had been taken and with no regard to how fair an opportunity to be heard it was, such a person cannot be heard to complain.

- [26] With regard to the observance of the audi rule before or after the decision has been taken, Goldstone J had this to say in **Momoniat v Minister of Law & order & others; Naidoo & others v Minister of Law and Order and others 1986(2) SA 265 (W)** at 274 D:

“Failure to observe the audi alteram partem principle before the decision is taken, as a general rule, will lead to invalidity.”

In this regard it is important to draw attention to the fact that Goldstone J there said “**as a general rule**”. He therefore did not

say that the audi rule must always be observed before the decision is taken failing which the decision would be invalid. Indeed, soon thereafter Goldstone J referred with approval to a passage in *Sachs v Minister of Justice* 1934 AD 9 at 22 which was approved on appeal (see 1934 AD at 38) where Tindall J inter alia said: **“But the fact that the persons to whom the decision is entrusted has (sic) in the first instance acted ex parte, without affording the person affected such opportunity, does not necessarily make his order invalid if he thereafter affords such opportunity”** (underlining supplied).

- [27] Baxter: *Administrative Law*, (1984) suggests at 587-8 that there are two exceptions to the general rule that **“failure to observe natural justice before the decision is taken will lead to invalidity”** The one exception, writes Baxter, is **“(w)here a statute authorises emergency, ex parte, action...”** Baxter writes that in such a case it might be implicit in the statute that, unless natural justice is excluded altogether, a hearing need only be given after the decision is taken. He said that, if there is no urgency, the Court will require natural justice to be observed beforehand. Baxter writes at 558 that the second exception is where **“there is a sufficient interval between the taking of the decision and its implementation to allow for a fair hearing; the decision maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and the affected individual has not thereby suffered prejudice.”** Baxter goes on to write at 588:

“These are concessions to the demands of administrative efficiency, but they are limited. A hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the effect of ‘curing’ the failure to hold one before.” (Underlining supplied.)

[28] This last sentence in the passage from Baxter is interesting when regard is had to certain dicta in **Slagment (Pty)Ltd v Building Construction & Allied Workers Union & others (1994) 15 ILJ 979(A)**. In that case the employer and the employees could not agree on whether the disciplinary inquiry should be a joint one or whether there should be separate disciplinary inquiries for the different employees. The employer wanted separate disciplinary inquiries whereas the employees wanted a joint or collective disciplinary hearing. In the light of this disagreement the employer decided to dismiss the employees without any hearing.

[29] Subsequently a hearing was held which was chaired by a Mr Hartzenberg which was referred to as an **“appeal”** hearing. This was a case where according to Counsel for the employees the disciplinary code applicable to the employees apparently gave the employees a contractual right to an appeal after the initial inquiry. However, writing for the majority, Nicholas AJA said at 992G that this was not a case in which **“domestic and administrative two – tier adjudicatory systems”** applied. Nicholas AJA went on to say at 992 H-I: **“There is no reason in principle why any unfairness**

at the stage of the dismissal should not have been cured by a full and fair hearing on appeal.” Later, at 994E Nicholas AJA said: **“In my opinion, the initial procedural unfairness was overtaken by the Hartzenberg hearing and it had no influence on the course of that hearing or its eventual outcome. In my view therefore any prejudice which resulted from the procedural deficiencies which attended their dismissals was cured.”**

- [30] I have referred to the Slagment decision to illustrate the point that in that case the Appellate Division held that the rules of natural justice had been complied with where there had been no hearing before the employees were dismissed but there had been one albeit in the form of an appeal hearing after they had been dismissed. The Court found that the appeal hearing had effectively undone whatever unfairness had been occasioned by the absence of a hearing before the dismissal. My reference to the Slagment case should not be construed as in any way an endorsement of the view or proposition that where a person is entitled to a hearing at first instance as well as to an appeal or where he is entitled to two hearings, the holding of a fair appeal hearing when there was a defective first hearing or no first hearing at all, or the holding of one fair hearing instead of two or the holding of a first defective hearing and a second fair hearing satisfies the requirements of the *audi alteram partem* principle. I say no more than simply that, where a person is entitled to an opportunity to be heard before a decision is taken and he is not given such an opportunity, in certain

circumstances an opportunity to be heard can be given after the decision and one of those circumstances is where the employee is offered a disciplinary hearing that is as fair, if not fairer, as the hearing that he or she was entitled to have been afforded before the decision could be taken. I also make the point that, where as in this case the employee is offered a hearing that would be chaired by a chairperson of the employee's choice who would make the relevant decision, then the *audi alteram partem* rule is complied with and such employee cannot complain about procedural unfairness if he or she rejected the offer or chose not to make use of it.

- [31] It is important to make three observations at this stage in regard to the facts in the Slagment case which may not be insignificant in the present case. The first is that there the decision to dismiss was taken without a hearing, although one had been offered to the employees. The second is that the decision to dismiss had been taken by a Mr Kinnear who was the factory manager in the factory in which the employees were based. The third is that the so-called “**appeal**” hearing was chaired by Hartzenberg who was the works manager of the company – and not of the factory where the employees and Mr Kinnear were based. A reading of the minority judgment by Smalberger JA in Slagment's case does not suggest that in principle he was of the view that, where a decision to dismiss was taken without a prior hearing, procedural fairness could not be achieved in any circumstances by a hearing after the decision had been taken. He drew a distinction at 997 D-F between a situation where the absence of an initial hearing is due to the fault

of the employee and where it is due to the fault of the employer. He said that a later appeal hearing that is fair can cure the unfairness of a defective first hearing or the unfairness of the absence of a first hearing where the defect in the first hearing or where the absence of the first hearing is due to the fault of the employee but not where it is due to the fault of the employer or the person in authority. It is unfortunate that Smalberger JA did not give a reason in his minority judgment why a defect in a first hearing should be curable when the defect is due to the fault of the employee and not when it is due to the fault of the employer. I do not see why it should make a difference in principle.

- [32] In **Turner v Jockey Club of South Africa 1974(3) SA 633 (A)** it was held that an appeal hearing held in accordance with the rules of the respondent club had not cured the deficient hearing of first instance that had been afforded the appellant. It may be important to emphasise that in Turner's case the right to a hearing and an appeal was provided for in the rules of the club. At 655D the Court had this to say: **"(W)here the decision of an inquiry board is vitiated by a disregard of the fundamental principles of justice, the matter cannot be corrected by a remittal or by further evidence, or in any other manner short of a hearing de novo;"**. Through Botha JA the Appellate Division said at 658 that, where the first hearing had been tainted, **"(w)hat was necessary, as was pointed out by Megarry, J, in Leary v N. U of Vehicle Builders, (1970) 2 All E.R. 713 at p.719, was, 'a venire de novo not the process of appeal, whereby the person aggrieved may be**

treated as bearing the burden of displacing an adverse decision which, for lack of natural justice, ought never to have been reached.”

- [33] While dealing with the issue of whether the absence of a pre-dismissal hearing or opportunity to be heard can be cured by a later hearing or later opportunity to be heard that comes after the decision has been taken, it is worth noting what was said by both the Labour Court, in **Chemical Workers Industrial Union v Johnson & Johnson (Pty)Ltd** [1997] 9 BLLR 1186 (LC) at 1198 E-H), and, this Court, in **Johnson & Johnson (Pty)Ltd v Chemical Workers Industrial Union** (1999) 20 ILJ 89 (LAC) at paras 49-51. The latter decision was an appeal from the former decision. One of the features of that case was that the employer had initially failed to offer female employees the opportunity to try certain jobs before dismissing them for operational requirements but had later offered them that opportunity and they did not accept it. Both the Labour Court and this Court on appeal held that the dismissal of such female employees was not by reason of such failure on the part of the employer unfair because it was the employees who had prevented the employer from remedying the initial defect when they did not accept the employer’s later offer.

- [34] Both in **Cabinet for the Territory of South West Africa v Chikane** 1989 (1) SA 349 (A) at 379 F-G and in **Administrator, Transvaal and others v Traub & others** 1989 (4) 8A 731(A) at 748 G-I and 750 B-F the Appellate Division (now Supreme Court

of Appeal) acknowledged that there are circumstances where it is acceptable for the audi alteram partem rule to be observed after the decision has been taken.

[35] I accept that this is not a case where the appellants had to act in a hurry and could not, for that reason, afford the third respondent an opportunity to be heard before the decision was taken. However, in my judgement the opportunity to be heard that the appellants offered the third respondent after the decision had been taken was so fair that it did not matter that it was offered after the decision had been taken. I say this because the opportunity to be heard offered to the third respondent after the decision was as fair as, if not fairer than, the opportunity to be heard to which she was entitled before the decision. This is so because, if the third respondent had been offered an opportunity to be heard before the decision could be taken, the appellants would have been the ones to hear her and take a decision whether she was guilty of misconduct and, if so, whether dismissal was appropriate. However, in terms of the opportunity to be heard that the appellants offered the third respondent, it was not the appellants but a third party of her own choice who would have chaired the hearing and made the decision whether she was guilty and, if so, whether dismissal was the appropriate sanction.

[36] In the last extract quoted from Baxter's work above, Baxter wrote that **“(a) hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the**

effect of ‘curing’ the failure to hold one before’. If one applied Baxter’s approach as to when an opportunity to be heard that is offered after the relevant decision has been taken will be acceptable, it seems to me that, without any doubt, the opportunity to be heard that the appellants offered the third respondent in this case was an acceptable one.

[37] With regard to Slagment’s case, although I do not wish to express any view on whether or not on the facts of that case the majority decision was correct, I do wish to emphasise that the Court held in that case that the employer’s failure to give the employees a hearing before the decision to dismiss them could be taken was cured by the holding of a hearing after the dismissal before Hartzenberg. If one has regard to the **“appeal”** hearing that was held to have cured the failure to hold a disciplinary hearing there and compares it with the hearing which the appellants offered to the third respondent in this case, there can be no doubt that the hearing that was offered to the third respondent was fairer than that given to the employees in Slagment. I say this because in Slagment the **“appeal”** hearing was chaired by another manager of the same company whereas in this case the hearing offered to the third respondent would have been chaired by an independent chairperson of the third respondent’s choice.

[38] Both the Court a quo and the commissioner expressed the view that the third respondent’s conduct in rejecting the appellants’ offer of a disciplinary hearing was understandable because her dismissal was

already a *fait accompli*. I do not agree. It may well be that the third respondent's dismissal may have been a foregone conclusion if the hearing that the appellants had offered her would have been chaired by one or more of them and if one or more of them would have had to make the decision whether she was guilty and, if so, whether she should be dismissed. However, it was not part of the offer that one or more of them would chair that hearing and make such decision. Indeed, the appellants' offer was that the hearing be chaired by a third party of the third respondent's choice.

- [39] From the above it can be inferred that it was going to be such third party as chairperson of the disciplinary hearing who would have had the power and the duty to determine whether the third respondent was guilty of misconduct and, if so, whether dismissal was the appropriate sanction. That being the case, it seems clear that the appellants would have had no power to make such decisions or that they would have been bound by the findings and decisions of the chairman of the inquiry. In a way it seems that what the appellants offered the third respondent resembled to a very significant extent a situation where two parties choose a private arbitrator. The only difference was that, if the third respondent was not happy with the findings and decision of such arbitrator, she would not have been confined to the remedy of a review as is normally the case with private arbitration. There is no doubt that she would still have been able to exercise her rights to refer an unfair dismissal dispute to an appropriate forum in terms of the Act for conciliation and thereafter, for arbitration. In other

words she was going to have the best of both worlds. First, her disciplinary hearing would have been chaired – not by her employer or employers – but by a third party of her choice and, yet, second, she would not have been bound by the decision of such third party if she did not like it.

- [40] How the third respondent could reject such an offer is, for me, difficult to understand. How the commissioner and the Court a quo could say that her rejection of such an offer is understandable and acceptable is even more difficult for me to understand. Particularly, when one of the principles which underlie the Act and which the Act seeks to promote is that employers and employees should agree upon disciplinary codes and procedures as well as other dispute resolution mechanisms. This was a case where, as I said earlier, the appellants, as the third respondent's employers, were in effect saying to her: come, let us agree on a disciplinary hearing that you will be satisfied will be fair! And she rejected that approach. For the third respondent to subsequently say that the appellants should have proceeded to hold a disciplinary hearing after she had rejected their offer is, in my judgement, disingenuous in the extreme because, if they had done so, she would, I have no doubt, have attacked the fairness of such a hearing on the basis that they had made up their minds before the hearing. Of course, such a hearing would have had to be chaired by one or some or all of the appellants because for such a hearing to be chaired by a third party, they would have needed her consent which, as already stated above, she had just withheld. Accordingly, although there is no

doubt that the appellants ought to have given the third respondent an opportunity to be heard before they could “**intend**” to cancel her contract of employment or dismiss her, it seems to me that they cured that defect or sufficiently compensated for their error when they offered the third respondent the hearing that they offered her which she rejected. There is absolutely no merit in the contention that the appellants should have proceeded to hold a disciplinary hearing after the third respondent had rejected their offer.

[41] The commissioner appears to have made an effort to follow what the Code of Good Practice: Dismissal (i.e. Schedule 8 to the Act) requires. That Code does not make any express provision to the effect that the opportunity to be heard can, in certain circumstances, be provided after the decision to dismiss has been taken. The Code is a guideline and cannot provide for all situations. Although the Code does not make any express provision for an opportunity to be heard after the relevant decision has been taken, it is our law that there are circumstances where the opportunity to be heard can be afforded after the decision has been taken. In my judgement the opportunity to be heard that was offered to the third respondent was one that complied with the *audi alteram partem* rule.

[42] In the third respondent’s heads of argument there was also a submission to the effect that it was not open to the appellants to argue that they had offered the third respondent a disciplinary hearing to be chaired by a person of her choice because, so went

the submission, the appellants had failed to put that part of their case to the third respondent during cross-examination so that she could respond to it. The difficulty with this contention by the third respondent is that it was not included in her answering affidavits. She, like any other party in motion proceedings, has to stand or fall by her papers. The third respondent must fall on this occasion. The appellants made the allegation in paragraphs 14.2.4. of their founding affidavit that the commissioner erred in law in concluding that the dismissal was procedurally unfair. They said that he erred because the appellants had **“offered the third respondent an opportunity to suggest the name of a person of her choice that she would have been comfortable [with] to preside over the intended disciplinary hearing.”** In par 14.5. of the founding affidavits the appellants referred to the fact that **“...we had afforded the Third Respondent an opportunity to be heard by a person of her choice.”**

- [43] In paragraph 14 of the answering affidavit the third respondent sought to deal with the contents of par 14 of the appellants' founding affidavit. There she did not respond to each subparagraph of paragraph 14 of the founding affidavit. She was content to simply say that **“(t)he contents of these paragraphs are denied in so far as it (sic) is in (sic) variance with the following:”** Thereafter followed paragraphs 14.1 to 14.7. When one has regard to the contents of par 14 of the third respondent's answering affidavit, there is nothing that she says therein which is at variance with paragraphs 14 of the founding affidavit. On the contrary what

she says in par 14.2.4 of her answering affidavit amounts to an admission that the appellants did make her the offer of a disciplinary hearing that would be chaired by a person of her choice. There she states that the **“[appellants’] offer to have the matter resolved by a (sic) independent person of my choice was merely lip service, as the decision to terminate my employment already (sic) arrived at before the meeting of 21 July 2000. I suspected at that stage that any indulgence in this regard by [appellants], was merely in an attempt to justify a dismissal which was unfair and pre-ordained.”** (Underlining supplied).

[44] The third respondent did not say that the appellants were not entitled to rely on that allegation because it had not been put to her during cross-examination. That is what she should have said if that was part of her case. In that way the appellants would have had an opportunity to show that this had in fact been put to her during cross-examination. To this end they might even have wished to supplement the record if it did not reflect that part of the cross-examination. In these circumstances the third respondent’s contention in this regard falls to be rejected.

[45] In the light of all the above I have no hesitation in concluding that both the commissioner and the Court a quo misconstrued the *audi alteram partem* rule and did not appreciate that in these circumstances that principle had been complied with even though compliance had occurred after the decision had been taken. The commissioner’s decision that the dismissal was procedurally unfair

was unjustifiable and should have been set aside by the Court a quo. Indeed, the commissioner's finding in this regard was a material error of law justifying that the award be reviewed and set aside. The Court a quo erred in not doing so.

[46] In the light of the conclusion that I have reached above it stands to reason that the appeal must succeed. With regard to costs on appeal, Counsel for the appellants submitted that this is a case in which the appellants would not press for costs. Accordingly, I shall make an order to the effect that each party shall pay its own costs. With regard to costs in the Court a quo Counsel for the appellants did not make any specific submissions. I propose to make a cost order in regard to the proceedings in that Court but of course the appellants will be at liberty not to enforce that order if their attitude in regard to costs on appeal applies to costs in the Court a quo as well.

[47] In the premises I make the following order:

1. The appeal is upheld.
2. Each party is to pay its own costs in regard to the appeal.
3. The order of the Court a quo is set aside and replaced with the following one:
“(a) **The application for review succeeds and that**

part of the arbitration award issued by the second respondent in the dismissal dispute between the applicants and the third respondent which is to the effect that the third respondent's dismissal was procedurally unfair is hereby reviewed and set aside.

(b) That part of the second respondent's award in terms of which the appellants were required to pay the third respondent compensation is hereby reviewed and set aside.

(c) The third respondent is ordered to pay the applicants' costs."

Zondo JP

I agree.

Davis AJA

I agree.

Nkabinde AJA

Appearances

For the Appellant : Adv V Soni SC with Mr Mokoena

Instructed by : Nalane Manaka Attorneys

For the 3rd Respondent : Mr Branford

Instructed by : Willem Koekemoer Attorneys

Date of judgment : 23 March 2006