



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1802/12

HERNIC FERROCHROME (PTY) LTD

Applicant

And

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

PAUL BOTHA N.O.

Second Respondent

JOCOBUS HENDRICK DANIEL LUIES

Third Respondent

Heard: 13 June 2014

Delivered: 22 July 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an opposed review application as well as an application by the third respondent (Luies) for condonation for the late filing of his answering affidavit.

Luies was dismissed by the applicant on 5 March 2012. A dispute was thereafter referred to the first respondent (CCMA) under case number GATW3537-12, and came before the second respondent (the Commissioner) for arbitration. The Commissioner issued an award on 18 July 2012 in terms of which it was found that the Luies' dismissal was procedurally and substantively unfair. The Commissioner ordered that the Luies be retrospectively reinstated, and also be paid an amount of R521 658.15 as back pay.

Background:

- [2] The applicant produces ferrochrome and operates in the North West Province. Prior to his dismissal Luies was employed as a Services Manager. His responsibilities included safety of the Services Department, including security and transportation of other employees. His dismissal followed upon an earlier bus accident that took place on 9 June 2011 with employees aboard. Following this accident, it is the applicant's case that Luies was instructed to ensure the safety of employees travelling in company vehicles by installing and fitting seat belts in various buses utilised by the applicant for the transportation of its employees. It is further the applicant's case that Luies was instructed to ensure that employees wore such seat belts on all the buses.
- [3] According to the applicant, the instruction to Luies was further to arrange for quotations for the installation of seat belts as well as to ensure their fitment and the enforcement of their use by passengers in the vehicles. There were a number of e-mails exchanged pertaining to these instructions as well as discussions in person, including an e-mail from Swanepoel, the COO and Luies' supervisor on 14 July 2011 stating:

"Jack

Dit klink baie. Ek onthou dat Highveld belde geinstaller het vir trokke wat opdaag sonder belde vir R100 'n belt! (dis nou wel 2 jaar gelede) kan ons uitving wat sal 'n beld kos by Midas en ander plekke?

Ons moet dit doen, maar dit klink rof!

Dankie

JS"

- [4] On 27 December 2011 another bus was involved in an accident which resulted in a number of employees being hospitalised. Luies inspected the bus and took a photo of the only seat with a seat belt, which belt was tied behind the seat. This photo was forwarded to Swanepoel. It however came to light that the bus was not fully fitted with seat belts.
- [5] Luies was questioned by Swanepoel as to why the bus had not been fully fitted with seat belts. Luies' response was to dispute that he had been instructed to ensure the fitment of the seat belts in buses. Luies was thereafter suspended with immediate effect and disciplinary steps initiated against him.
- [6] Luies was charged with 6 counts of misconduct to which he had pleaded not guilty. The disciplinary hearing was presided over by Mr E Killian (Killian) of Frontiers Employers' Association of which the applicant is member. Killian found Luies guilty of all charges and recommended that he be summarily dismissed.
- [7] Luies appealed against the chairperson's decision and was partially successful, as two charges were overturned. However the recommended sanction remained the same. Luies thereafter referred an unfair dismissal dispute to the CCMA, resulting in an award which is the subject of the current review proceedings.

Application for condonation:

- [8] The review application was filed and served on 4 September 2012. This was followed by a supplementary affidavit on 15 January 2013. Luies filed and served his answering affidavit on 7 March 2013, whilst a replying affidavit was filed and served on 13 March 2013.
- [9] In the replying affidavit, it was pointed out that the Luies' answering affidavit was out of time and that he had not applied for condonation. Luies should

have served and filed his answering affidavit by 17 December 2012 but only did so on 12 March 2013. An agreement was entered into between the parties extending the period for the filing of the answering affidavit on a number of occasions with the final date for service being 1 March 2013. Luies nevertheless alleges that the applicant agreed not to oppose the condonation application due to the extensions granted. The applicant however denies having agreed not to oppose the application.

[10] It is now trite that in order to succeed with an application for condonation, the party seeking such indulgence from the Court must show the following:

(a) the degree of lateness or non compliance with the prescribed time frames is not excessive; (b) provide a full explanation of every aspect of the period the lateness or the failure to comply with the time frames, (c) show that there are prospects of succeeding or that there exists a *bona fide* defence when the matter is to be considered in the main case, (d) show the importance of the cases, (e) show that the delay was not due to the fact that the applicant was not interest in the finality of the matter¹.

[11] In the often referred to decision in *Melane v Santam Insurance Co Ltd*², the Court held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[12] A further consideration whether or not to grant condonation is the steps that a party had taken as soon as it became aware that there was non-compliance with the required time frames. Thus, it is expected of a party to bring the application for condonation as soon as it becomes apparent that there is a need to do so. In further exercising its discretion, a Court will be influenced by considerations of fairness³

¹ See *Forster v Steward Cott Inc* (1997) 18 ILJ 367 (LAC) and also *Gaoshubelwe and others v Pie Man's Pantry (Pty) Ltd* (2009) 30 ILJ 347 (LC).

² 1962 (4) SA 531 (A) at 532 C-F

³ *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F

- [13] The founding affidavit to the application for condonation was deposed to by Pierre Wolmarans, of Luies' attorneys of record. Luies deposed to the replying affidavit in this regard. In explaining the delay in filing the answering affidavit, Wolmarans averred that the appointed counsel, Adv Wilke was briefed in the matter during 2012 to draft the answering affidavit. It is not deemed necessary to deal with all the averments pertaining to Adv Wilke other than to state that he was unable to timeously settle the answering affidavit due to other work commitments.
- [14] The applicant correctly takes issue with the founding affidavit as deposed to by Wolmarans and the reasons proffered for the late delivery of the answering affidavit. In this regard, it was submitted that Luies and Wolmarans knew on 7 March 2013 that the answering affidavit was out of time and that condonation was required. There was no explanation as to the reason that the application was only faxed on 12 March 2013 when the answering affidavit was served on 7 March 2012.
- [15] It was further submitted that Wolmarans was not a party to the review proceedings, and that the contentions in regards to the workload of Counsel were inadmissible hearsay evidence. Furthermore, it was submitted that from the reading of the founding affidavit, Luies was not involved in its preparation, and that a belated attempt was made to file his confirmatory affidavit with a view of regularising and involving him.
- [16] Significant with Wolmarans' founding affidavit is that it was not accompanied by either Luies' or Adv Wilke's confirmatory affidavit. Adv Wilke's submission during the hearing of this application that counsel can confirm the correctness of the contents of the founding and answering affidavits from the bar cannot be sustained. As correctly pointed out on behalf of the applicant, his submissions were merely in regards to his own circumstances, and was not evidence for the purposes of the application before the Court. To attach any weight to these submissions as made from the bar would clearly prejudice the applicant in the light of its opposition to the application.

- [17] Luies' confirmatory affidavit to the founding affidavit was only attached to his replying affidavit, and this confirms the applicant's contentions that this was clearly with an attempt to involve him in the founding affidavit *albeit*, late. Furthermore, little weight should be attached to Luies' replying affidavit to the extent that he seeks to amplify Wolmarans' allegations. It is trite that a case cannot be made out in a replying affidavit⁴.
- [18] Given the manner with which this application was brought before the court, it should be concluded that not much weight can be attached to any averments made by Wolmarans in respect of either Luies or Adv Wilke. I am in agreement with the applicant's contentions that the allegations regarding Adv Wilke in the supporting and Wolmarans' founding affidavits are mere hearsay and should thus be struck off.
- [19] Even if any merit was to be attached to allegations made in respect of Adv. Wilke, the Court cannot accept the explanation that he was committed to other work hence he could not timeously attend to the founding affidavit. This explanation is not only lame but also unconscionable, and the Court cannot be seen to countenance non observation with time frames simply on the basis that Counsel was overburdened with other work. Our Courts have repeatedly held that there is a limit beyond which a litigant cannot escape the result of his or her attorney's lack of diligence⁵.
- [20] The only explanation in Wolmarans' founding affidavit that requires any attention is in regards to the contention that as a result of extensions granted, the applicant had waived its rights or agreed not to oppose the application for condonation. The applicant vehemently denies having agreed to grant an extension to 8 February 2013 from the initial date of 29 January 2013, and contended that it only agreed to a further extension until 1 March 2013. It was contended that it could not have granted such an extension as it was not aware of Adv Wilke other commitments.

⁴ *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) at para 29

⁵ See *Saloojee & another v Minister of Community Development* 1965 (2) SA 135 (A) 141 B-H and *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC)

- [21] I am also in agreement with the applicant's submissions that it could not have indicated to Luies or his attorneys of record that it would not oppose the application for condonation, particularly in view of the number of extensions it had granted. Even so, it is not for the parties to agree to waive compliance with the Court's Rules and the fact that there may have been an agreement to disregard the applicable time frames does not imply that the Courts should equally look the other way when there is non-observance with its rules.
- [22] It is accepted that Wolmarans was Luies' representative at the arbitration proceedings. However, in regards to Luies' prospects of success in the main application, mere averments were made by Wolmarans without substantiation that he had such prospects.
- [23] To the extent that the above problems with this application have been pointed out, it follows that in the words echoed in *Moila v Shai N.O. and Others*⁶ the purported explanation for the delay in Wolmarans' founding affidavit amounts to no explanation at all, and in the circumstances, it would not be necessary to consider the prospects of success or other considerations pertinent to such applications. This is even more apposite in this case, where a bald allegation that the Luies has excellent prospects of success as evidenced by the answering affidavit in the review application was made. To this end, the application for condonation for the late delivery of the answering affidavit is dismissed, and the review application should be treated as unopposed.

The review application.

(i) *The award*

- [24] In his analysis in the arbitration award, the Commissioner having heard the evidence of Messrs E Killian, SN Mafoane, Johan Swanepoel Charles Nkosi, and also that of Luies, came to the conclusion that;
- a) The primary issue was whether the e-mail referred to elsewhere in this judgment was an instruction as per the charge, and whether Luies had failed to carry it out.

⁶ (2007) 28 ILJ 1028 (LAC) at para 34

- b) “On a balance of probability” and taking into account simple consideration of language structure and context into account, the e-mail was not an instruction, and was more an indication not to proceed since the price of installation seemed to be high according to Swanepoel. The e-mail simply suggested other ‘goutes’, and gave no details and no requirements for feedback. The only reason the applicant in this case could claim that the e-mail was an instruction was probably because it could not justify the dismissal.

(ii) *Grounds for review:*

[25] The applicant raises a number of grounds for review in its application. These in certain instances overlap and are summarised as follows;

- (a) The Commissioner failed to take into account material evidence and failed to deal with evidence given by the applicants’ witnesses during the arbitration, *inter alia* relating to the trust relationship between the parties and the existence of an instruction to Luies relating to the installation of seatbelts in buses used by other employees.
- (b) The Commissioner made a finding which is not supported by the evidence in that he recorded that the applicant did not argue that reinstatement would be intolerable or impractical when it was the latter’s view that such was clear through the evidence led.
- (c) The Commissioner failed to apply his mind to the evidence before him, and in particular, to the dispute as to whether or not an instruction had been issued to Luies or not. The Commissioner’s finding in this regard was deemed irregular by the applicant.
- (d) The Commissioner failed to discharge his mandate in that he failed to decide the guilt of Luies in respect of each of the charges levelled against him during the disciplinary proceedings.
- (e) The Commissioner committed errors of law in his findings. This is based on the allegation that reinstatement was ordered due to the

finding of substantive unfairness and not due to it being the most suitable remedy.

- (f) The Commissioner did not apply his mind in making his decision based on his awarding of reinstatement of Luies.
- (g) The Commissioner failed to apply his mind to the finding that there was no instruction given to Luies.
- (h) The Commissioner's finding relating to procedural unfairness is irrational and not substantiated by evidence.
- (i) The award is reviewable because the Commissioner did not resolve factual disputes in the witnesses' versions and provided a superficial analysis of the evidence of the witnesses.
- (j) The Commissioner wrongfully curtailed the leading of evidence at the arbitration proceedings.
- (k) The Commissioner erred in permitting Killian to give evidence and represent the Applicant.
- (l) The Commissioner erred in that his finding went beyond the parameters of the procedural unfairness complained of by Luies.
- (m) The Commissioner erred in finding that the e-mail from Swanepoel to Luies on 14 July 2011 was an indication not to proceed with the installation of the safety belts.
- (n) Luies' version is essentially that the e-mail from Swanepoel on 14 July 2011 was not a clear instruction to him to have the safety belts installed, and that it was simply communication pertaining to other avenues being investigated, including the outsourcing of transport.

(iii) *The legal framework and evaluation:*

[26] The test for review as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁷ involves the reviewing court having to determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach in relation to the material placed before him or her.

[27] The *Sidumo* test was further explained in *Herholdt v Nedbank Ltd* as follows;

*“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable”*⁸

[28] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁹, the Labour Appeal Court posed the following questions with a view to determining whether a commissioner has properly acquitted him or herself;

“..... (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator’s decision one that

⁷ [2007] 12 BLLR 1097 (CC) at para [110]

⁸ *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* (2013) 34 ILJ 2795 (SCA) at para [25]

⁹ (2014) 35 ILJ 943 (LAC)

*another decision-maker could reasonably have arrived at based on the evidence?"*¹⁰
 (Citations omitted)

- [29] It is trite that in considering whether a dismissal was substantively fair, a Commissioner is obliged to determine whether the reason that led to that dismissal was fair¹¹. In this case Luies was dismissed on account of gross negligence, gross insubordination, putting the lives of fellow workers in danger, and breach of the trust relationship in that he had allegedly failed to discharge his responsibilities as a manager of the department by grossly neglecting an instruction from his supervisor to ensure that all Hernic buses were fitted with safety belts and the wearing of such belts.
- [30] It was common cause that on appeal, Luies was not found guilty on the two initial charges pertaining to gross dishonesty and making false statements or misrepresentation. Contrary to the applicant's contention that the Commissioner ought to have considered all six charges of misconduct against Luies in the arbitration proceedings, there was no such obligation on the Commissioner as Luies following the appeal hearing was only dismissed on account of the four charges, which for the purposes of section 188 (1) (a) of the LRA were the reasons for the dismissal.
- [31] Central to the Commissioner's findings however was that the applicant had not on a balance of probabilities, proven that an instruction was issued to Luies as alleged. The basis of the Commissioner's conclusions was the e-mail relied upon by the applicant upon its language and structure, did not constitute an instruction.
- [32] I am in agreement with the applicant that the Commissioner's conclusions in this regard constituted a reviewable irregularity, and that he had indeed failed to take into account the totality of the material placed before him in coming to

¹⁰ At para [20]

¹¹ Section 188 (1) of the LRA provides that;

A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

- (a) That the reason for a dismissal is a fair reason-
 - (i) Related to the employee's conduct or capacity; or
 - (ii) Based on the employer's operational requirements; and
- (b) That the dismissal was effected in accordance with a fair procedure

that conclusion. That conclusion is one which a reasonable commissioner could not have come to in the light of the material and evidence before him. My conclusions in this regard are fortified by the following;

- [33] It was common cause that following upon the first bus accident of 9 June 2011, and the enquiries in this regard made by the CEO of the applicant, the instalment of seat belt in buses and the enforcement of their wearing became a concern, resulting in an exchange of e-mails with the safety officer, Nkosi, and the COO, Swanepoel. Swanepoel had then sent an e-mail to Luies to install and enforce the wearing of seat belts on all company buses, and the latter's response was to say that it was fine and that the head of security Billy Botha was to get quotations to install the seat belts in the company buses.
- [34] On 14 July 2011, Botha had obtained a quotation which he had forwarded to Luies, and who had in turn forwarded to Swanepoel on 14 July 2011. Swanepoel's response to Luies according to the applicant constituted an instruction which the Commissioner had nevertheless found otherwise. To the extent that the Commissioner had relied on the ordinary language and structure of the contents of the e-mail in concluding that it was not an instruction, he failed to deal with the substantial merits of the dispute in that;
- (a) On 10 June 2011, Swanepoel had forwarded an e-mail from the CEO to Luies and Botha which stated "*For action please*" in relation to the CEO's enquiries whether buses had seat belts installed and the enforcement of those belts.
 - (b) In respect of the e-mail of 14 July 2011, Swanepoel's explanation was that the quotation given in respect of the installation of the seat belts in buses was very high. He nevertheless considered the e-mail to be an instruction to fit seat belts¹².
 - (c) After the second bus accident and when Swanepoel made enquiries with Luies about why the bus was did not have seat belts installed, the latter's response was that he had not received any instruction

¹² P 168 of the record, line 21-23

that the buses should be fitted with seat belts. This response was strange to Swanepoel as he had sent Luies e-mails¹³.

- (d) The seat belts were installed in buses in January 2012 after the second accident, and this had taken a few days¹⁴
- (e) On 1 September 2011 during a Safety Committee Meeting, Nkosi had raised the issue of seat belts in buses and Luies' response was that safety belts had been installed in one bus and other buses were to follow.
- (f) Only after the second bus accident did Luies make any effort to ensure that buses had seat belts installed.
- (g) It was never disputed by Luies that there was a need to install seat belts in the buses, and further that there was continuous communication in that regard. His main defence under examination in chief was that the e-mail in question was a mere communication as it did not specify any due dates.
- (h) During cross-examination however, he conceded that he did not deny that an instruction was issued to install the safety belts, but that the e-mail from Swanepoel was not an instruction¹⁵. He had conceded that he had received an e-mail from Swanepoel stating; "*For action please*"¹⁶, and had responded that Billy would get the quotations. His evidence further was that he had acted on Swanepoel's instruction and Nkosi had followed up on the matter with him¹⁷.
- (i) Luies had further conceded under cross-examination that he had received the instruction to enforce the wearing of seat belts¹⁸, but

¹³ P 171 of the record, line 6-9

¹⁴ P175 of the record, line 16-19

¹⁵ P306 of the record, line 17 - 23

¹⁶ P 307 line 1

¹⁷ P79

¹⁸ P323 line 10-15

that he had only acted on the instruction on 28 December 2011 after the second bus accident¹⁹.

- (j) Evidence was led at the arbitration proceedings by Mafoane that when asked about the second accident his response was that the issue of seat belts had slipped his mind.

[35] It is apparent from the Commissioner's conclusions that the above evidence, which was critical to a finding whether an instruction was issued or not was completely ignored. In approaching the matter in the manner as he had, the Commissioner failed to take into account the background already set out, and treated the e-mail by merely giving a literal interpretation to it without contextualising it in relation to the other material and evidence before him. The net effect of the failure to consider all of the above, rendered the outcome reached by the Commissioner unreasonable.

[36] The applicant had also attacked the Commissioner's findings in regards to procedural fairness. The Commissioner had in this regard concluded that Luies was not accorded a fair disciplinary enquiry on the basis that he was not provided with detailed reasons of the findings by the appeal chairperson.

[37] Item 4 (1) of Schedule 8 – Code of Good Practice as contained in the LRA merely provides that after the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision. The Code does not provide guidelines on appeals. I am however of the view that there is no obligation on an employer or the chairperson of an appeal to provide detailed reasons in regards to an appeal lodged by an employee. What is required ordinarily is to have such an appeal considered once lodged, and to make a determination in that regards.

[38] In this case, an appeal hearing was held on 29 February 2012, was considered and a determination made²⁰. A failure by the chairperson of the appeal hearing to provide detailed reasons for his decision cannot on its own constitute procedural fairness.

¹⁹ P 313 line 9 - 14

²⁰ P581 of the bundle

- [39] Significant however to the Commissioner's findings was that Luies' dismissal was also procedurally unfair in that the chairperson of the enquiry, Kilian, was biased. The Commissioner acknowledged that "*Whilst there was probably no easy way for the applicant (Luies) to determine bias during his (internal hearing), bias affecting the applicant became apparent during arbitration*"²¹
- [40] The Commissioner's reasoning in respect of the above was that Kilian, who was the presiding officer in the internal enquiry and also the applicant's representative in the arbitration proceedings had remarked at one point that that the trust relationship between Luies and the applicant was broken. This remark was not made as an expression of an opinion or his findings, but in the same way and tone that was expected of a witness employed by the applicant. Furthermore, from the mere fact that Kilian had acted in both capacities, the Commissioner observed that this had worked against any assumption or assertion that he was an objective chairperson, and accordingly and in retrospect, the internal hearing was most probably not conducted by an objective chairperson, making it unfair²².
- [41] The above conclusions are extraordinary in the extreme on the basis that it does not appear to have been Luies' case that the chairperson of the enquiry was biased, and it is apparent that the Commissioner considered issues that were not before him. Once the Commissioner had formed the view that *there was probably no easy way for the applicant (Luies) to determine bias during his (internal) hearing*, that should have been the end of the matter. As correctly pointed out on behalf of the applicant, the Commissioner clearly went beyond his mandate in making a finding of bias.
- [42] The Commissioner's conclusions in this regard are a further indication that he clearly misconstrued the nature of the enquiry into procedural fairness. Where the objectivity of an internal chairperson is questioned, it can only be measured and determined against his or her conduct during the disciplinary enquiry itself and from his or her findings, and not from the Commissioner's own subjective perceptions and inferences.

²¹ Paragraph 13 of the award (p42 of the bundle)

²² Para 15 of the award at p43 of the bundle

[43] The Commissioner in this case made a finding of bias on the basis of Kilian's conduct as the applicant's witness in the arbitration proceedings. There was a need on the part of the Commissioner to distinguish between Kilian's two different roles as both chairperson of the enquiry and as representative of the employer in the arbitration proceedings. Significantly however is that Kilian's objectivity as a chairperson had not been questioned by Luies in the arbitration proceedings, and even if it had, the Commissioner again misconstrued the test of bias.

[44] The test of bias is whether there is existence of a reasonable suspicion of bias²³, and the applicant alleging bias does not have to demonstrate actual bias²⁴. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*²⁵ the Constitutional Court elucidated the test as follows;

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."

[45] Within the context of a disciplinary enquiry, the test therefore requires an objective and reasonable apprehension by the employee that the presiding officer would not determine the matter in an impartial manner or without prejudice to him or her. Significantly however, a mere subjective suspicion of bias or apprehension of bias on the part of the employee is not on its own sufficient as more is required²⁶. That apprehension of bias must be based on reasonable grounds²⁷.

[46] In this case, as already indicated, the Commissioner completely misconstrued the test of bias. The apprehension or suspicion of bias *must not* be that of the Commissioner, but that of the employee subjected to the disciplinary enquiry.

²³ *BTR Industries SA (Pty) Ltd & others v Metal & Allied Workers Union & another* (1992) 13 ILJ 803 (A),

²⁴ *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 690 A – B

²⁵ 1999 (4) SA 147 (CC) at 177B – C

²⁶ See *S v Malindi & Others* 1990 (1) SA 962 (A) at 969 G – H;

²⁷ *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafood Division Fish Processing)* 2000 (3) SA 705 (CC)

In this case, the Commissioner put himself in the shoes of Luies and pursued the argument surrounding bias out of his own. In coming to his conclusions, the Commissioner was influenced by speculation and baseless inferences.

- [47] By adjudging Kilian's conduct in the arbitration proceedings and concluding in retrospect that he would have not been impartial in the internal proceedings on account of his different role in the arbitration proceedings, the Commissioner committed gross misconduct. To this end, his conclusions in this regard do not fall within a range of reasonableness.

Conclusions:

- [48] In the light of it having been concluded that the findings of the Commissioner on both substantive and procedural fairness were not those of a reasonable Commissioner in the light of the material before him, it follows that the award should be reviewed and set aside.
- [49] The flaws that rendered the award unreasonable have been pointed out, and having had regard to the record of the proceedings, the submissions made and the conclusions reached, no purpose would be served by remitting the matter back to the CCMA, and the Court is in a position to finally dispose of the matter. I have further had regard to the submissions in regard to the issue of costs and based on considerations of law and fairness, it is determined that no cost order should be made. In these circumstances, the following order is made;

Order:

- i. The application to condone the third respondent's late filing of the answering affidavit to the review application is dismissed.
- ii. The award issued by the second respondent under case number GATW3537-12 dated 18 July 2012 is reviewed and set aside.
- iii. The above award is substituted with an order that;

“The dismissal of Jacobus Hendrick Daniel Luies by Hernic Ferrochrome (Pty) Ltd was procedurally and substantively fair”.

- iv. There is no order as to cost in respect of both the application for condonation and the review application.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv O Mooki

Instructed by: Cowan – Harper Attorneys

On behalf of the Respondent: Adv F Wilke

Instructed by: Manong Badenhorst Abott van Tonder Attorneys

LABOUR COURT