

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: J 2003/98

In the matter between:

NEDBANK, A DIVISION OF NEDCOR LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER ISAAC N RAPHELA NO

Second

Respondent

M G MAMABOLO

Third Respondent

SACCAWU

Fourth Respondent

J U D G M E N T

BASSON, J

- [1] This is a review in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant seeks to review an award made by the second respondent under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The applicant seeks to review the award in terms of which the second respondent found that the third respondent, Mr MG Mamabolo, was unfairly dismissed by the applicant, both substantively and procedurally.
- [2] The gist of the findings of the arbitrator is set out in the arbitration award (at page 25 and further of the papers) and summed up at paragraph 10 of the founding affidavit (at page 8 and further).
- [3] The second respondent found that the dismissal of the third respondent was procedurally unfair because "the employer failed to show that there was proper attention given for an opportunity to get a representative by the employee. As such this amount to erosion of this fundamental right. The procedural requirements as afore discussed were also tainted and it cannot be held that this cardinal requirement was fulfilled".
- [4] It must be noted that the third respondent gave no evidence at the arbitration and his alleged representative only was called to give evidence. This witness, in terms of the arbitration award where it sums up the evidence, stated that he was merely a

minute-taker and not a representative.

[5] However, this version was never put to any of the respondent's witnesses according to the evidence as summed up by the arbitrator and the averments in this regard in the founding affidavit. It also appears from the minute of the disciplinary enquiry (at page 32 to 36 of the papers) which was part of the bundles agreed upon at the pre-arbitration conference that the witness was indeed the representative of the third respondent and not merely a minute-taker.

[6] The finding of the arbitrator to the effect that the third respondent was not properly represented therefore cannot be substantiated on the facts.

[7] Further, the evidence of the respondent's witnesses as summed up by the arbitrator shows that only a representative of a recognised trade union could act as a representative at the disciplinary enquiry. The union to which the third respondent apparently belonged was not a recognised trade union and accordingly the enquiry was adjourned for him to find a representative who was a fellow employee.

[8] In the event, as far as the finding in regard to procedural unfairness is concerned, this finding is not justifiable in relation to the facts presented to the arbitration and falls to be set aside on review.

[9] This was the main thrust of the attack on the fairness of the dismissal by the third

respondent during the arbitration and accordingly it played a major part in the eventual finding in regard to the unfairness of the dismissal.

[10] Also in regard to the substantive unfairness of the dismissal, it was clear from the evidence given by the witnesses for the respondent that acts of insubordination did take place in that there was a refusal to make out the cheques concerned and a refusal to attend the meetings concerned.

[11] Even though it was put under cross-examination to these witnesses that there was a reason for this proffered by the third respondent, it was never really refuted that these actions did not take place.

[12] Accordingly, the finding (at paragraph 10.2) to the effect that:

"The employer has also failed to bring important witnesses that the employee was evading his duties, the evidence given before me lacked in material aspects on the charges brought against the employee as direct witnesses who apparently worked with him and realised the said mistakes were not present at the hearing"

cannot be substantiated on the facts as the facts did, indeed, substantiate these actions by the employee. It was merely the reasons given for these actions that were placed in dispute.

[13] In the event, the findings of the arbitrator were not justifiable in relation to the

reasons given and the arbitration award falls to be set aside on review.

[14] In the absence of a record of the arbitration it is not possible for me to substitute my own finding for that of the arbitrator as the outcome of the arbitration cannot be regarded as a foregone conclusion. The proper remedy is therefore to refer the matter back to the CCMA for an arbitration anew before a different arbitrator.

[15] In the event, I make the following order:

1. The arbitration award handed down by the second respondent under Case No. NP3009 on 19 June 1998 under the auspices of the first respondent is reviewed and set aside.
 2. The matter is remitted to the first respondent for a hearing anew before a different commissioner.
 3. No order is made as to costs.
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BASSON J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

PLICANT : MR S HARDIE

: Edward Nathan & Friedland Inc

PONDENT : IN PERSON

T : 19 JANUARY 1999