

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO D 947/98

In the matter between:

ELLERINES HOLDINGS

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

1st Respondent

PETERSEN SOSIBO

2nd Respondent

JAMES ROY SMITH

3rd Respondent

J U D G M E N T

ZONDO J:

Introduction

[1] James Roy Smith, the third respondent in this matter, had been employed by Ellerines Holdings Limited, the applicant, as a manager for about eight years as at January 1998. As at January 1998, he was the branch manager of the applicant's branch at Kokstad, KwaZulu Natal. He was dismissed from his position as the branch manager of the Kokstad Branch on the 13th of January 1998. He was unhappy with that

decision and, therefore, referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration, (“**the CCMA**”), the first respondent in this matter, initially for conciliation and, later, for arbitration.

[2] The second respondent was appointed to arbitrate the dismissal dispute in terms of the Labour Relations Act of 1995, (“**the Act**”). He issued an award to the effect that the third respondent's dismissal was unfair and ordered that the applicant should pay the third respondent compensation in the amount of R51 000,00.

[3] This is a review application which the applicant has brought in terms of section 145(2) of the Act to have that award reviewed, set aside and corrected. The application is opposed only by the third respondent. The first and second respondents abide the decision of this Court.

Condonation Application

[4] In terms of section 145(1)(a) of the Act, a party to a dispute which has been arbitrated and who alleges a defect in the arbitration proceedings under the auspices of the CCMA “**may apply**” to the Labour Court for an order setting aside the arbitration award -

“(a) within six weeks of the date that the award was served on such a party unless the alleged defect involves corruption,

(b) ...”

[5] In this matter the award was telefaxed to the applicant by the second respondent, on the 2nd November 1998. In this case, argument was presented on the basis that the period of six weeks from the date that the applicant was served with the award ended on Friday the 11th of December 1998. The applicant's review application was voluminous. It consisted of up to 170 pages, including Annexures. The application papers were served on the first respondent by personal delivery thereof on the first respondent's head office. With regard to service on the second and third respondent, the applicant sought to serve the papers by telefaxing them. Also the applicant intended filing the papers with the registrar by telefaxing them. As the telefax machines of the registrar's office in this court, of the second as well as of the third respondent, (the third respondent's fax machine in this case being, in fact, a fax machine belonging to a firm by whom he was employed as at about 11th December 1998), could not handle such a large volume of paper, a special arrangement was made between the applicant's attorneys and each one of the respondents.

[6] With regard to the filing of the review application with the registrar of this Court, the applicant's attorneys arranged with the registrar that, in the light of the review application consisting of so many pages and the registrar's fax machine being unable to handle such a large volume of papers, only the notice of motion and the founding affidavit, excluding annexures and supporting affidavits, would be telefaxed to the registrar on the 11th December 1998 and the complete application papers would

be filed on another day.

[7] Similar arrangements were made between the applicant's attorneys and the second and third respondents. In respect of the second respondent, that was effected on the 11th of December. In respect of the third respondent, it was arranged at the instance of the third respondent that the notice of motion and the founding affidavit be faxed to the applicant's regional office, which was just across the road from the firm where the third respondent was employed at the time and he was going to get the notice of motion and founding affidavit from that office.

[8] A complete set of the review application was, by arrangement between the two parties, going to be delivered to the third respondent on a later date. The applicant faxed the notice of motion and the founding affidavit to its regional office as arranged with the third respondent. Someone from the regional office of the applicant took the papers and went across the road to give the papers to the third respondent, but had to return with them as the third respondent could not be found. On Monday, the 14th December 1998, a full set of the papers was delivered to the third respondent.

[9] The third respondent has taken the point that, as in this case, the last day of the six week period referred to in section 145, was the 11th of December, the applicant was required to ensure that the review

application was not only filed with the registrar on the 11th December, but also that the respondents were served with copies of such application on that day. As it was only on the 14th December that the third respondent was served with the review application, that was out of time and therefore, so the argument went, the applicant had not made its application within the period of six weeks prescribed in sec 145 of the Act. It was argued that it would not help the applicant on this point that the review application was filed on time with the registrar because “**apply**” as used in sec 145 means to file and serve and not to file only.

[10] The third respondent's counsel submitted that, if he was correct in this submission, his further submission was that the applicant applied to this Court outside the six week period. He went on to submit that this Court has no power to condone a failure on the part of an applicant in a review application under section 145 to so apply within the six week period. He submitted that the rationale behind the legislature's decision not to confer such power on the Court was to ensure finality in disputes such as this one.

[11] For the proposition that the Court has no power to condone such non-compliance with the six week requirement, Mr Sarantos, who appeared for the third respondent, relied on **Queenstown Field Distributors CC v Labuschagne NO and Others 1999(3) BLLR 268 (LC)**, a judgment of this Court given by my colleague, LANDMAN J. For the proposition that the rationale behind the six week cut-off point in section 145(i)(a) is

early finality of disputes, Mr Sarantos referred also to a judgment by my Brother MLAMBO J in **Pep Stores (Pty) Ltd v Laka NO and Others** 1998(19) ILJ 1534 at 1540F, which was also quoted by LANDMAN J in the **Queenstown** matter. I hasten to point out that MLAMBO J did not, in the **Pep Stores** matter, hold that this Court has no power to condone non-compliance with the six week requirement of section 145.

[12] As a result of his conclusion that this Court has no power to condone non-compliance with the six week requirement, LANDMAN J dismissed the review application in the **Queenstown** matter. Having stated that generally there appears to be no inherent power residing in a Court to condone a failure to comply with time-limits laid down in a statute, LANDMAN J went on to observe that there are sections in the Act where the legislature has specifically conferred on the Court the power to condone non-compliance with time-limits appearing in certain sections of the Act. In this regard he referred to section 111(4), as well as section 191(2). He observed that in section 145, the legislature had not made any provision giving the Court power to condone non-compliance with the time-limit therein stated.

[13] LANDMAN J said the legislature was aware that the time-limits it fixed in the Act may be difficult for parties to comply with. He concluded that the inevitable conclusion was that, in those sections, such as section 145, where the legislature fixed time-limits for the taking of certain steps but made no provision in those sections conferring the power on this Court to condone non-compliance with them, the

legislature did not intend the Court to have the power to condone such non-compliance.

[14] Section 158(1)(f) of the Act says this Court may:- **"subject to the provisions of this Act, condone the late-filing of any document with, or the late referral of any dispute to, the Court."** In this case, when I drew the provisions of section 158(1)(f) to the attention of counsel for the third respondent, who was relying on the decision in the Queenstown matter, he submitted that the phrase, **"subject to the provisions of this Act"**, appearing therein, meant that where, as in section 145, there was no provision giving this Court power to condone non-compliance with a time-limit in such a section, section 158(1)(f) would not confer such a power.

[15] I pointed out to Counsel for the third respondent that the scenario where section 158(1)(f) could quite clearly not apply to would be one where, like in section 111(4) and 191(2), an express power to condone non-compliance with a time-limit had already been given to the Court. I said the above because, in such a case, there was already a power to condone conferred on the Court and there would be no need for section 158(1)(f) for such a situation. I said the position must be that the general provision to condone, such as the one provided for in section 158(1)(f), must be meant for those situations in the Act where time-limits are provided for the taking of certain steps but the sections are themselves silent as to whether non-compliance with them can be

condoned in the first place, and, if they can be condoned, on whom the power to condone resides. When this was pointed out to the third respondent's counsel, he indicated that he could not take the matter further but stood by his submission. In my view, his submission cannot be upheld.

[16] With great respect I am unable to agree with Landman J's conclusion that this Court has no power to condone non-compliance with the six weeks requirement in sec 145 of the Act. This Court does have the power to condone non-compliance with the six weeks requirement in section 145. LANDMAN J appears to have overlooked the provisions of sec 158(1)(f) in the **Queenstown** matter. I am of the opinion that the word "**document**" used therein is so wide that it will include, amongst others, an affidavit, a notice of motion, an annexure to an affidavit, as well as a statement of claim or a response to a statement of claim.

[17] Since hearing argument in this matter, my attention has been drawn to another judgment which is to the same effect as the view I have expressed in this matter on this issue of condonation of non-compliance with the six week requirement in section 145. That is a judgment of MLAMBO J in **Mabombo v Shoprite Checkers Holdings (Pty) Ltd and Others** 1998(12) BLLR 1307 LC. That judgment appears to have been given on the 13th of August 1998, which was earlier than the judgment of LANDMAN J. In that judgment, MLAMBO J came to the same conclusion that I have come to in this matter. It would appear that

LANDMAN J's attention was not drawn to this judgment nor, as I have already indicated, was it drawn to the provisions of section 158(1)(f) of the Act. I have, however, noted that LANDMAN J's matter was unopposed and, therefore, he did not have the benefit of full argument on the matter.

[18] At the time of proof-reading the transcript of this judgement - which I had already handed down on the 5th May 1999, I became aware of another judgement which went the same route as **Queenstown**. That is the as yet unreported judgement of Jajbhay AJ in **National union of Mineworkers v Commission for Conciliation, Mediation and Arbitration & Others case no : J1918/98** which it appears was handed down on the 7th May 1999 Johannesburg - two days after I had handed down this one in Durban.

[19] I have considered that judgement. Unlike Landman J, Jajbhay AJ did consider the provisions of sec 158(1)(f). He held that the **“filing of an application for the review of an arbitration award under the auspices of the CCMA does not fall within the ambit of”** sec 158(1)(f). He also said **“an application for a review of an arbitration award ‘does not’ constitute the referral of a dispute to the Court”**. While he is probably right on the latter, he is not right on the former.

[20] Unfortunately Jajbhay AJ does not give any reason for his

conclusion that **“the filing of an application for the review of an arbitration award under the auspices of the CCMA does not fall within the ambit of”** sec 158(1)(f). I say he does not give any reason for this conclusion because the objects of the Act and other views about the need for the expeditious resolution of disputes to which he devotes much of the judgement do not explain this particular conclusion. They are matters which, as he correctly points out, need to be borne in mind in interpreting provisions of the Act. But this would apply if there was ambiguity or where to apply the ordinary and grammatical meaning of the words used in the statute could lead to an absurdity. No one can reasonably suggest that, if the provisions of sec 158(1)(f) were given their ordinary and grammatical meaning namely, that, they give the Court the power to condone, among others, a delay in filing a review application in terms of sec 145 of the Act, that would lead to an absurdity. In fact there can be no suggestion that the provisions of sec 158(1)(f) are ambiguous.

[21] Sec 158(1)(f) refers to the **“filing of any document”**. A notice of motion is clearly a document. An affidavit is clearly a document. A review application will consist of a notice of motion, an affidavit or affidavits and, maybe, annexures. Once this is accepted, I can see no reason why Jajbhay AJ could say the filing of a review application does not fall within the ambit of sec 158(1)(f) unless he meant that the filing of a review application does not constitute the filing of a document as contemplated by sec 158(1)(f). That, of course, would not be justified by the wording of the section.

[22] Contrary to the decision in **Queenstown** I have already concluded, that this Court has power to condone a delay in making an application for review under sec 145 of the Act. In the light of **Queenstown**, I cannot give effect to my own conclusion without much ado simply because I do not share Landman J's conclusion in that case. However, it is quite clear that Landman J's attention was not drawn to the provisions of sec 158(1) (f) in that matter. Accordingly Landman J did not consider those provisions in arriving at the decision that he arrived at. In those circumstances I am satisfied that I am at liberty not to follow the decision in **Queenstown**. It is therefore open to me to give effect to my own conclusion.

[23] Assuming without deciding that the applicant applied to this Court as contemplated in section 145 one court day outside the stipulated six week period, I am more than satisfied that on the uncontested explanation given for such delay, good cause has been shown for such non-compliance with the six weeks requirement. Accordingly, I hereby grant condonation insofar as condonation may be required for the applicant's delay in making its application for review in terms of sec 145 of the Act.

[24] Before proceeding, I note that at 271A of his judgement, LANDMAN J suggested that it could be argued that the six week requirement infringes on the constitutional right of access to Courts but

said that, in that case, the issue could not be resolved by this Court. LANDMAN J said this was because this Court was not empowered to adjudicate on the constitutionality of the laws which it applies. I do not agree with this view, nor do I agree with the reason on which it is based.

[25] My view is that this Court has power to adjudicate the constitutionality of any statute which is relevant to a matter in respect of which it has jurisdiction. This is because the Constitution of the Republic of South Africa No 108 of 1996 recognises among others courts whose status is equal to that of the High Courts and it provides that such Courts have power to deal with the constitutional validity of statutes but, as is the case with the High Courts, such orders of such Courts are subject to confirmation by the Constitutional Court. Support for my view in regard to the above is to be found in secs 166(e), 172(1) and (2) of the Constitution read with sec 151(1) and (2) of the Act. Sec 166(e) of the Constitution gives recognition in our judicial system to courts **“established or recognised in terms of an Act of Parliament including any court of a status similar to either the High Court or the Magistrates’ Courts”**.

[26] Sec 172 deals with powers of courts in constitutional matters. In sec 172(2)(a) the Constitution says : **“The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but has no force**

unless it is confirmed by the Constitutional Court”. In this regard it must be noted that the Magistrates Courts are not mentioned in sec 172(2) (a) among the courts that have such power. Then sec 151(2) of the Act says the Labour Court is **“a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to matters under its jurisdiction”**. That, in my view, shows that, if it was argued that the provisions of sec 145 relating to the six weeks requirement were unconstitutional because they infringe the Constitutional right of access to courts, the Labour Court would have power to make an order of constitutional invalidity in respect of those provisions if it found them to be inconsistent with the constitution.

Factual background to the dismissal

[27] Before dealing with the merits of the review application, it is necessary to deal with the background to the dismissal which led to the arbitration which, in turn, led to this review application. As already stated above, the third respondent was employed by the applicant as the branch manager of its branch at Kokstad. His immediate superior was one Mr Lehman, who was the regional manager of the applicant. One of the rules of the applicant applicable to its employees read as follows: **"No member of company personnel shall be dishonest in the performance of his duties. Dishonesty shall include theft, fraud, falsification/destruction of records, falsification/misrepresentation of information and evidence where applicable."**

[28] The third respondent knew the rules of the applicant and understood that to act dishonestly would be a violation of the rules of the applicant. One of the applicant's requirements to the third respondent as branch manager of one of its branches was that he had to "**make budgets at certain intervals.**" The requirement of "**making a budget**" was simply a requirement to meet a target in terms of sales of the branch at certain intervals or within certain time-frames.

[29] In November 1997 the third respondent falsified certain documents and inflated his sales by creating fictitious sales. The effect of this was that it would appear to the applicant that the third respondent had reached his targets. The further result hereof would be that the third respondent would be entitled to a certain commission or bonus. This falsification and misrepresentation was discovered. The third respondent was given a final written warning for this and was informed that, if he committed a similar offence again in the future, that could lead to his dismissal.

[30] While that the third respondent was given a final written warning for this was common cause during argument, it was not common cause that the giving of that final written warning was preceded by an interview/disciplinary inquiry. The applicant said that it had been preceded by an interview, while the third respondent maintained that it had not been. If it becomes necessary to deal with the relevance of this, it will be dealt with later in this judgment.

[31] The 31st December 1997 was the last day in 1997 that the third respondent was required to **“make his budget. He realised that he was not able to meet his budget”**. He realised that he could not meet this dead-line. He then telephoned his immediate superior, Mr Lehman, and told him that he was not able to make his budget. Mr Lehman responded by instructing the third respondent to make his budget, **"by hook or by crook."** Up to that point, the parties were agreed during argument on what transpired during the telephone conversation. However, there was a dispute during argument about whether Mr Lehman also said that the third respondent should **"work pending sales and lay-byes."** The applicant said Mr Lehman said this to the third respondent. It was argued on the third respondent's behalf during argument that Mr Lehman did not say this during the conversation. I will return to the significance of this shortly.

[32] The third respondent then proceeded to dishonestly falsify the records of the applicant and to create fictitious sales so as to represent that the sales that had been made in the branch were such that he had made his budget. Within a week or so after the 31st December 1997, the third respondent reversed the fictitious sales that he had created. An auditor discovered what the third respondent had done and the third respondent was suspended from duty pending further investigation. He was subsequently charged with the misconduct of falsification in that he had invoiced deals and artificially inflated the December 1997 actual

sales in order to achieve budget. He was called to a disciplinary inquiry.

[33] During the disciplinary inquiry, the third respondent admitted the allegations against him, but stated that he did what he did because he had been instructed by Mr Lehman to make budget by hook or by crook. He did not suggest that Mr Lehman had specifically instructed him to falsify documents and to create fictitious sales in order to achieve his budget. However, he said it was his understanding that that is what Mr Lehman was instructing him to do when he said he should make his budget by hook or by crook.

[34] At this stage, it is necessary to revert to whether Mr Lehman had also said to the third respondent, during the telephone conversation of the 3rd December 1997, he should, **"work pending sales and lay-byes."** **"Working pending sales and lay-byes"** is a phrase that refers to a legitimate practice whereby a customer who has a credit balance is contacted and asked whether he would like his credit balance changed to a deposit for the purchase of further goods. It also refers to a situation where a customer, who has goods on lay-byes, is asked whether he is in a position to pay the balance outstanding for a full deposit and to enter into a Credit Agreement. In each scenario if the answer is in the affirmative, effect is then given to such wish of the customer and that transaction then counts as a sale which can be taken into account for purposes of making a budget.

[35] If Mr Lehman did tell the third respondent to work pending sales and lay-byes, then it seems that that would go a long way in showing that the third respondent, having been told this, could not possibly have believed that Mr Lehman's instruction was that he should engage in an illegitimate and dishonest exercise for purposes of achieving his budget. If Mr Lehman did not say this, the position will remain where the question on this issue would be confined to whether the mere instruction alone, that the third respondent should make budget by hook or by crook, was an instruction to act dishonestly. If the answer is in the negative, that may be the end of that part of the inquiry. If the answer is in the affirmative, it seems to me that, that would not necessarily be the end of that part of the inquiry, but that, furthermore, the question that would need to be addressed, would be whether that an employee has been instructed by his superior to act dishonestly is, on its own, a defence to a charge of acting dishonestly.

[36] I agree with Ms Fulton, who appeared for the applicant, that I must accept that there is no dispute on the papers about the applicant's version that Mr Lehman did say to the third respondent that he should work pending sales and lay-byes. The applicant makes the allegation in par 55 of its founding affidavit that during his evidence at the arbitration Mr Lehman testified that he had said this to the third respondent. The third respondent deals with the contents of paragraph 55 in paragraph nine of his answering affidavit. There, the third respondent does not deny that allegation by the applicant.

[37] Insofar as the third respondent may have sought to rely on the notes of the Commissioner to say this was in dispute, that is, in my view, misplaced. Firstly, in motion proceedings a respondent is required to indicate in his answering affidavit the basis on which it will oppose an applicant's application. Insofar as a respondent may seek to travel outside the basis of his opposition as revealed by his answering affidavit, that is not permissible. In motion proceedings, each party stands or falls by its papers. At any rate the notes of the Commissioner are not given under oath, nor are they certified in any way as a true and accurate reflection of what transpired before the Commissioner. In fact to a very large extent they are illegible. Accordingly not much weight may be attached to them. In those circumstances I find that Mr Lehman did instruct the third respondent to **“work pending sales and lay byes”**. On this basis the third respondent could not have understood that he was being instructed to act dishonestly.

[38] As to the instruction that Mr Lehman gave to the third respondent to make the budget by hook or by crook, the applicant says, by the use of this phrase, Mr Lehman sought to create a sense of urgency in the mind of the third respondent and that he would never have instructed the third respondent to falsify documents or to in any way act dishonestly.

[39] The third respondent requested to be allowed to call one Mr Vuzani as a witness. The chairman of the disciplinary inquiry refused his request. The result of the inquiry was that the third respondent was

found guilty of the misconduct he had been charged with and was dismissed. He lodged an internal appeal as to the chairman's refusal to allow the calling of Mr Vuzani at the inquiry. It was suggested that the chairman of the inquiry was justified in so refusing when the request was made at the time of the inquiry because the applicant, being fully aware of his rights in such a situation, should have made arrangements much earlier for Mr Vuzani to be called to attend the inquiry and to give evidence. The third respondent's counsel submitted that the chairman ought to have postponed the inquiry to enable Mr Vuzani to be called as a witness.

[40] Again, in the appeal the third respondent had asked for Mr Vuzani to be called to give evidence for him. The chairperson of the appeal hearing did not have Mr Vuzani called to physically attend the hearing and give evidence. However, he did telephone him and obtain his evidence over the telephone. According to the applicant, the third respondent was given an opportunity to put questions to Mr Vuzani on the telephone but the third respondent denies this and says he was not given such an opportunity. I will revert to deal with this later on. As already stated, the internal appeal ended with a finding or a confirmation of the findings of the initial hearing and the dismissal of the third respondent was confirmed. As already stated, the dispute was subsequently referred initially to conciliation and later to arbitration under the auspices of the first respondent.

[41] The second respondent, as already indicated, was appointed to arbitrate the dispute. Evidence was led before him. The applicant has given detailed evidence of that evidence that was placed before the second respondent during the arbitration. Largely, the third respondent admits, in its answering affidavits, the applicant's version of what evidence was led and by whom it was led in the arbitration proceedings. Such areas as it was submitted on the third respondent's behalf, were not common cause in that regard seemed to have, to a very large extent, been based on a disregard of the affidavits of the parties and, in particular, the answering affidavit of the third respondent to the founding affidavit of the applicant. But there are one or two areas of dispute in regard to that issue.

[42] The second respondent's award was that the third respondent's dismissal was both substantively and procedurally unfair. He ordered the applicant to pay the third respondent compensation in the amount of R51 000,00. At this stage, it is necessary to consider the grounds on which the applicant has attacked the arbitration award of the second respondent in these review proceedings.

Consideration of the review application

[43] The applicant's attack on the second respondent's award was directed at both the finding that the dismissal was substantively unfair, as well as the finding that the dismissal was procedurally unfair. In each case, the applicant contended that the second respondent committed gross

irregularities and that he exceeded his powers inasmuch as he had given an award which was not justifiable in relation to the reasons given for it and which had no rationale connection with the material that was placed before him. I will consider the finding of substantive unfairness, as well as the finding of procedural unfairness, in turn.

Alleged Substantive Unfairness

[44] In the last page of his award, the second respondent said he found the third respondent's dismissal to be substantively unfair. A reading of his award suggests that this was because the second respondent found that the third respondent had acted on the instructions of his superior. Immediately after making this finding, the second respondent said that, on the evidence before him, he was convinced that, if the auditor had not discovered what the third respondent had done, Mr Lehman would not have taken any action. It is not clear what the evidential basis is of this statement by the second respondent, save that it might be based on the evidence of Mr Vuzani.

[45] However, even if one were to assume that the third respondent understood Mr Lehman's instruction to require him to act dishonestly, a finding to that effect by the second respondent should not have been the end of the inquiry on whether the third respondent was or was not guilty of the dishonest conduct he had been charged with because it was not the third respondent's evidence that the reason why he had carried out what, on his own version, was an instruction to act dishonestly, was that, if he

had not done so, he would have been harmed in any way. In the absence of evidence to that effect, which would have meant that, maybe, the third respondent might have been justified in carrying out an otherwise illegal instruction, the fact that he acted on his immediate superior's instruction could not by itself have justified his conduct. An employee is under no obligation to obey an illegal instruction. If he obeys an illegal instruction knowing it to be illegal, he does so at his own risk.

[46] In the light of this, the second respondent's finding that the dismissal was substantively unfair is, in my view, one which is not justifiable in relation to the reason given for it and falls to be reviewed and satisfied. The third respondent's counsel also sought to justify the second respondent's finding of substantive unfairness on the basis that the applicant had applied discipline inconsistently in this case because the third respondent was dismissed for his misconduct and yet on the evidence which was given by Mr Vuzani at the appeal hearing, it was clear that Mr Vuzani had also committed the same offence and yet had not been dismissed.

[47] There are three observations I wish to make in regard to this submission. The first is that it does not appear from the second respondent's award that he found that there had been a case of inconsistency and that that was part of the reason why he found that the dismissal was substantively unfair. Secondly, a reading of the respondent's answering affidavit does not disclose that this would be part

of the basis on which he was opposing the applicant's review application. In fact, he presented his case in the answering affidavit, not on the basis that he was not guilty, but on the basis that dismissal was not an appropriate penalty. Thirdly, the third respondent was on final written warning for a similar offence already. Mr Vuzani was not on final written warning. That alone would be a sufficient ground to distinguish between the two cases. In fact, on the evidence presented by the applicant, Mr Vuzani had been counselled already in relation to his misconduct. In this case, the third respondent had been given a final written warning in relation to a similar offence only one month before the incident which gave rise to his dismissal and it was not his case that he should not have been given a final written warning in relation to that incident because he was not guilty of the misconduct complained of. His complaint was simply that with regard to that final written warning, the giving of such final written warning had not been preceded by a disciplinary interview.

[48] It seems to me that once it is accepted, as I think it must be, that the third respondent accepts that he was guilty of a similar offence one month before the incident which gave rise to his dismissal, then his case cannot be said to be comparable to that of Mr Vuzani. The argument presented by the third respondent's counsel was that insofar as the applicant says Mr Vuzani had been counselled in relation to such misconduct, that was not enough. He said this was a case where the applicant, in order to be consistent in its application of discipline, ought to have taken formal disciplinary action against Mr Vuzani. He said, in

the light of the way in which the applicant had treated Mr Vuzani in relation to similar conduct, the third respondent ought not to have been given a penalty of dismissal, but should have been given a lesser penalty. There is, in my view, no justification for that submission.

[49] The applicant was faced with an employee who had committed very serious misconduct in November of 1997 by falsifying and acting dishonestly by creating fictitious sales. The employee, on his own version, knew the rules of the company. He had been a manager for close to eight years or thereabout. He was a branch manager and was required to show example and he engaged in what was clearly a dishonest exercise. He was lucky that he was not dismissed at that stage but was given a final written warning. The documents presented by the applicant show, and this is not denied by the third respondent, that the third respondent was informed at that time that if he committed a similar offence again, he could be dismissed.

[50] Hardly a month later, the third respondent engaged in a similar exercise in circumstances where one would have thought that he would have been careful because, the fact that he was on a final written warning ought to have been a notice to him that he should mend his ways. He did not mend his ways and in relation to the incident of December 1997, he was dismissed. In my view, there can be no justification in the complaint that the applicant ought not to have dismissed him, but to have given him a lesser penalty because of the fact that Mr Vuzani had been engaged in a

similar exercise.

The procedural finding

[51] I now need to deal with the procedural unfairness point or finding of the second respondent. The applicant has attacked the finding of the second respondent that the dismissal of the third respondent was procedurally unfair on the same grounds that it has used to attack the finding that the dismissal was substantively unfair. The applicant contends that the second respondent committed gross irregularities and exceeded his powers in that he made a finding on procedural unfairness which was not justifiable in relation to the reasons given for it and that the finding has no rational connection with the material which was before the second respondent.

[52] The award which has been given by the second respondent is difficult to follow in certain respects. I have already said that in the last page of the award, the second respondent said he was finding the dismissal of the third respondent to be both substantively and procedurally unfair. When I say that the award of the second respondent is difficult to follow in certain respects, this must be seen against the last three paragraphs of the award which will indicate, at least in part, what I am referring to. There the second respondent says :- **"I find that the dismissal of the applicant was substantively and procedurally unfair. I find that the applicant was denied the basic rights to exercise at the inquiry and this was conceded by Mr Jordaan who was called as the**

company witness. The chairman should have recused himself because it is trite law that if the chairman is seen by the accused to be biased or prejudiced, he should recuse himself."

[53] Further on he said: **"With evidence before me, I am convinced that the applicant acted on instructions by the area manager who was his superior. It was never contradicted that the applicant had a clean loyal service for seven years, it is only with the introduction of Mr Lehman. I am further convinced that if the auditor did not find the applicant reversing the balances in January, Mr Lehman could not have taken any action against the applicant. I find that just and equitable compensation in the circumstances is the total of six months' wages. The employer is ordered to pay the employee the sum of R51 000,00 within 14 days of this award."**

[54] From what I have read of the last page of the second respondent's award, it will be clear that there are sentences which simply not make sense. But quite apart from that, I also do not understand from at least that part of the award what the basis was for the finding that the dismissal was procedurally unfair. The second respondent says that the third respondent was denied, **"The basic rights to exercise at the inquiry."** I do not know what the second respondent meant by this. Ms Fulton also could not make sense out of it. The third respondent's counsel attempted to say this must have meant that the second respondent

found that the dismissal was procedurally unfair because the third respondent was denied the right to call Mr Vuzani to the disciplinary inquiry. I am far from satisfied that this necessarily refers to that. But at any rate, earlier on in the award in the same paragraph, which is the third paragraph on the last page of the award, there appears to be a reason which the second respondent was relying upon for saying that the dismissal was procedurally unfair. He says, **"The chairman should have recused himself because it is trite law that if the chairman is seen by the accused to be biased or prejudiced, he should recuse himself."**

[55] It seems to me that this is the basis on which the second respondent found that the dismissal was procedurally unfair, namely that the employee, the third respondent, had asked that the chairperson of the initial inquiry should recuse himself and that the chairperson had wrongly refused to recuse himself. It seems that the only basis on which the second respondent found that this was unfair is that he believed the law to be that as long as an employee says or believes that the chairperson of an inquiry will be biased, that is enough to require the chairperson to recuse himself, and that the chairperson cannot refuse in those circumstances to recuse himself. That, of course, is simply not the law.

[56] Such suspicion as a party might have of bias on the part of a presiding officer, is required to be one which can reasonably be entertained by a lay litigant. The third respondent's counsel was unable

himself to support this reasoning by the second respondent. It seems to me that, insofar as the question of procedural unfairness is concerned, there can be no doubt that the reason given by the second respondent for his conclusion that the dismissal was procedurally unfair, is simply not justifiable and had no rational connection with the material that was placed before him and that, on that ground, it ought to be set-aside.

[57] The one point which remains which was pressed by the third respondent's counsel during argument was his submission that the dismissal remained procedurally unfair because the third respondent had asked that he should be allowed to call Mr Vuzani as a witness, but had been denied such opportunity. The third respondent's counsel submitted that this made the dismissal procedurally unfair and that the second respondent's finding of procedural unfairness is defensible on that basis.

[58] Ms Fulton's reply to this was that the chairperson of the disciplinary inquiry had been justified in refusing to have Mr Vuzani called because there was no explanation given why the third respondent had not made prior arrangement for Mr Vuzani to be called, especially because the applicant was dealing with a senior employee, a branch manager who, on the evidence before this Court, knew at all times material hereto what his rights were in relation to disciplinary hearings and the calling of witnesses.

[59] Ms Fulton also submitted that, in any event, even if the chairperson of the inquiry was wrong not to allow Mr Vuzani to be called, even if the chairperson ought to have postponed the inquiry, in order to give the third respondent an opportunity to call Mr Vuzani, such defect in the initial inquiry, as may have existed, was cured by the full hearing that took place at the appeal stage. The third respondent's counsel, with regard to the giving of the evidence by Mr Vuzani at the appeal stage, submitted that:

1. A fair appeal hearing does not cure a defective initial hearing.
2. He submitted that the third respondent had not been given an opportunity to put questions to Mr Vuzani because only the chairperson of the appeal hearing spoke to Mr Vuzani.

[60] There appears to be a dispute of fact with regard to this because the applicant, in its founding affidavit, says that although Mr Vuzani gave his evidence telephonically, the third respondent was given an opportunity to put questions to him and elicit whatever evidence he wanted to elicit.

Determination, or, Remittal, of the dispute?

[61] The question that arises in relation to this is what the effect is of this dispute of fact. It seems to me that this can be dealt with in conjunction with an issue which also arose during argument, namely what I should do with the matter if I came to the conclusion that the award of the second respondent should be reviewed and set-aside. The issue is whether I should refer the matter back to the CCMA to be heard

by the same Commissioner or I should refer the matter back to the CCMA with an order that it should be heard by another Commissioner, or whether this Court should itself determine the dispute as requested by the applicant.

[62] In this regard, Ms Fulton emphasised that, as far as the applicant was concerned, its submission was that this was a proper case where the Court should determine the dispute itself. This submission was based largely on the fact that, to a very large extent, the facts were common cause and that it would cause an unnecessary delay and cost to refer the matter back to the CCMA. However, she submitted that, if I decided that it would be preferable to refer the matter back to the CCMA, then in that event, the matter should not be heard by the same Commissioner and I should order that it should be heard by another Commissioner.

[63] On this part of the matter, both Ms Fulton and counsel for the third respondent were agreed that if I referred the matter back, it should not be heard by the same Commissioner. In this regard, it transpired during argument that the third respondent was also unhappy about some aspects of the award of the second respondent, namely the amount of compensation that was awarded. Counsel for the third respondent indicated that, although the second respondent appears to have wanted to award compensation equal to six months' salary for the third respondent, the amount of R51 000,00 simply did not reflect six months' salary in respect of the third respondent. He sought to ask the Court to vary the

award in this regard but was not able to present any argument as to how the Court could do that in circumstances where the third respondent had not filed a counter review application which would have had to be served on the second respondent to give him an opportunity to defend his award with regard to the period of six months, as well as the amount of compensation that he ordered. The conclusion that I have reached is such that it does not make it necessary for me to deal with that. In those circumstances, I am satisfied that I should not deal with that aspect of the matter.

[64] The question that arises is, insofar as the third respondent might have been dealt with unfairly in that he was not allowed to call a witness that he sought to call at the initial hearing, that might well have made his dismissal to be procedurally unfair. As I have already indicated, there is a dispute of fact in relation to that aspect. Otherwise the facts appear to be largely common cause.

[65] If because of that the dismissal was procedurally unfair or could be said to have been procedurally unfair, it appears to me that rather than refer this review application to oral evidence which neither party actually asked for, I would need to consider whether I should not refer the matter back to the CCMA for arbitration by another Commissioner who would then deal with, among other issues, that issue. However, I am of the opinion that I ought not even to refer the matter back to the CCMA because even if one were to assume that the third respondent was treated

unfairly, in that he was not allowed to call Mr Vuzani at the initial hearing, this is a situation where, in all probability, the fact that the dismissal may have been procedurally unfair on that basis, would probably not be sufficient to justify the awarding of any relief to the third respondent.

[66] I say that because the dispute relates to a serious act of misconduct involving dishonesty, one of which the third respondent had made himself guilty of at least on one previous occasions already. One is here dealing here with a case where the third respondent gives no explanation why, knowing his rights in relation to disciplinary inquiries as we now know he does, he did not make prior arrangements for Mr Vuzani to be present at the inquiry. Furthermore, it is not suggested that the third respondent did request the chairman of the initial inquiry to postpone the inquiry.

[67] With regard to the appeal, insofar as the third respondent may be saying that he was not given an opportunity to put questions to Mr Vuzani on the telephone, he does not say why he did not request to do so if he wanted to put questions to Mr Vuzani. This is not a case where he asked to put questions to Mr Vuzani on the telephone, but was not given that opportunity. That is so even on the third respondent's own version. On the applicant's version, he was given such an opportunity and did put questions. The mere fact that Mr Vuzani gave evidence telephonically and did not physically attend the appeal hearing, would not

by itself necessarily detract from the fairness, of the appeal hearing. The question at the end of the day would be whether or not the third respondent had been given a fair hearing at the appeal. If Mr Vuzani had given his evidence telephonically and the third respondent had put questions to him and had been able in that way to elicit all the evidence he sought to elicit, that would have been a fair hearing unless there was a reason why his physical presence at the inquiry was crucial for the fairness, or otherwise, of the appeal hearing.

[68] I also put it to the third respondent's counsel that it was not clear exactly what the purpose had been of calling Mr Vuzani, namely whether the purpose of calling Mr Vuzani was to establish that there had been inconsistency in the application of discipline by the applicant as between the third respondent and Mr Vuzani or whether the purpose was to elicit evidence that would establish that there was a wide-spread practice that whenever Mr Lehman required branch managers to **“make budget by hook or by crook”**, that implied that he was requiring them to act dishonestly.

[69] I say this without being unmindful of the fact that the third respondent is not lawyer and, therefore, was not presenting his case as a lawyer. But nevertheless, one is dealing here with a senior employee, a manager, because one would expect that, if he wanted to put questions to Mr Vuzani during the appeal hearing over the telephone, he would have asked to be given that opportunity.

[70] In all the circumstances, it seems to me that there is overwhelming evidence that would tend to indicate that, even if I referred this matter back to the CCMA on the basis that there may well be a case for the third respondent to pursue with regard to procedural fairness of the dismissal based on his denial of the right to call Mr Vuzani as a witness, at the end of the day the arbitrator would not exercise his discretion in favour of awarding the third respondent any compensation. In this regard I am referring to the discretion which an arbitrator, as well as this Court, has in dealing with dismissal which is unfair only because no fair procedure was followed, whether to award or not to award compensation in such a matter.

[71] In those circumstances, I am of the opinion that this Court ought to itself determine the dispute. Having regard to the material before the Court, the only determination that the Court is driven to is that the dismissal of the third respondent by the applicant was not unfair and that his claim of unfair dismissal ought to have been dismissed.

[72] In the circumstances, the order that I make is, therefore, the following:

1. The award of the second respondent in the dispute between the applicant and the third respondent under case number 14082 is hereby reviewed and set-aside.
2. It is determined that the dismissal of the third respondent by the

applicant in January 1998 did not constitute an unfair dismissal.

3. The third respondent is ordered to pay the applicant's costs of this application.

R. M. M. ZONDO

Judge in the Labour Court of SA.

Date of Argument	:	3 May 1999
Date of Judgement	:	5 May 1999
For the Applicant	:	Miss K. Fulton
Instructed By	:	Bowman Gilfillan INC
For the 3 rd Respondent	:	Mr A. M. Sarantos
Instructed by	:	Elliot & Walker