

IN THE LABOUR COURT OF SOUTH AFRICA HELD AT
JOHANNESBURG CASE NUMBER J891/98

In the matter between

Cycad Construction (Pty) Ltd Applicant

and The Commission for Conciliation, Mediation and Arbitration 1st Respondent

Seedat NO 2nd Respondent

B C Dlamini 3rd Respondent

JUDGMENT

de VILLIERS A J

1. This is the combination of an application in terms of s158(1)(c) by the Third Respondent (Dlaimini) to have the arbitration award of the Second Respondent (the Commissioner) dated 11 March 1998 made an order of Court, and an application in terms of s145 of the Labour Relations Act 66 of 1995 (the Act) for an order setting aside that award. The applications have been consolidated in terms of Rule 23.

2. The only basis for the Applicant's opposition to the award being made an order of Court is its contention that the award falls to be set aside on review. It was agreed that should this Court find that the award does not fall to be reviewed and set aside then the opposition to the award being made an order of Court falls away. It is therefore proper that the determination of the review application be dealt with first.

3. The Applicant seeks to have the award set aside because the arbitrator's finding (that the dismissal of the Third Respondent (Dlamini) by the Applicant was unfair only because the dismissal was not effected in accordance with a fair procedure) does not pass the test established by the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus NO and Others** [1998] 11 BLLR 1093 (LAC), in that there is no rational objective basis justifying the connection made by the Commissioner between the material which was properly before him and the conclusion at which he arrived.

4. The Applicant also contends that the Commissioner failed to apply his mind to the provisions of Schedule 8 Item 4 of the Act, and rather relied on outdated authority and principles applicable to procedural fairness in making his decision.

5. Finally, the Applicant contends that the Commissioner exceeded his powers, according to Applicant's Heads of Argument, by entering into and finding on a question which was not in dispute between the parties as Dlamini denied that a disciplinary enquiry had taken place.

6. In the award the Commissioner bases his finding, that the dismissal of Dlamini was not effected in accordance with a fair procedure, on the following.

6.1. According to the testimony of a Mr Smith (Smith), the Applicant's finance and human resources director (as recorded by the Commissioner in the award), Dlamini was given a good couple of hours to prepare for the disciplinary enquiry. The Commissioner found this to be insufficient in view of the fact that the offence was committed in KwaZulu Natal and the hearing took place in Springs, Gauteng. The Commissioner relies on the findings in **Trauschweitzer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools** (1991) 12 ILJ 1099 (IC) in coming to this conclusion.

6.2. Again, according to Smith's testimony (in response to questions put to him by the Commissioner as recorded by the Commissioner in his award), although there was an appeal mechanism in place, Smith (the person who chaired the enquiry) failed to advise Dlamini of his right to appeal. In this instance the Commissioner relied on the findings in **MAWU v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd** (1988) 9 ILJ 129 (IC) in coming to this conclusion.

6.3. The third critical mistake, according to the Commissioner, was that the evidence against Dlamini at the enquiry was submitted by way of a written statement thus denying Dlamini an opportunity to question his accuser. The Commissioner finds authority for coming to this conclusion in **Gounden v Amalgamated Beverage Industries Ltd** (1990) 11 ILJ 800 (IC).

7. It is common cause that at the arbitration Dlamini denied that a disciplinary hearing had taken place. His evidence was that, a few days after his return from KwaZulu Natal (where he had been working) to the Applicant's head office in Springs, Smith gave him copies of the minutes of the hearing, paid his wages and dismissed him.

8. The question that arises is whether the Commissioner, having found this testimony to be untrue, could rely on the Applicant's witness's evidence, some of which was adduced on questioning by the Commissioner, to find procedural unfairness. Put another way, having found that the evidence of Dlamini does not support a finding of procedural unfairness, can the Commissioner still find procedural unfairness based on the evidence of the Applicant's witnesses?

9. In dismissal disputes, the onus to prove that the dismissal is fair rests on the employer (s192(2) of the Act). In order to prove that the dismissal is fair, the employer must adduce evidence which proves that there was a fair reason for the dismissal **and** that the dismissal was effected in accordance with a fair procedure (s188 of the Act).

10. In terms of s138(1) of the Act:

The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities. (my emphasis)

Thus, in determining dismissal disputes, s138(1) read with s188 and s192(2) of the Act not only allows but compels a Commissioner to delve into both the substantive and the procedural aspects of a dismissal since at the end of the arbitration the Commissioner will have to determine both the substantive and the procedural fairness of the dismissal. Thus, once

procedural fairness, for whatever reason, is placed in dispute (as it was in this case), in order to determine the dispute fairly, a Commissioner is entitled to canvass the various aspects of procedure with the employer's witnesses and rely on the testimony so adduced to determine whether the dismissal was, in fact, effected in accordance with a fair procedure.

I therefore do not agree with the Applicant's contention that the Commissioner exceeded his powers by questioning and relying on the evidence of Smith in coming to the conclusion that he did. I now turn to the Applicant's contention that the Commissioner's finding of procedural unfairness is not rational or justifiable as per the **Carephone** test.

The Labour Court in **Carephone** recognized that, in extending the scope of review to encompass the constitutional provision that administrative action must be justifiable in relation to the reasons given for it, a requirement of rationality in the merit or outcome of the administrative decision is introduced. However the Court also sounded a note of caution by saying that the test did not allow for one adjudicator's opinion of what is justifiable to be substituted with that of another. At 1102I-J, Froneman DJP said the following:

|| In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the || merits|| of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.†

Opinions regarding what constitutes procedural fairness abound, both prior to and after the coming into effect of the Act and the Code. Some adjudicators take a fairly strict approach, demanding that employers adhere to what has become affectionately known as the Ten Commandments of Bulbulia (a reference to the 10-point test laid down by that highly respected member of the industrial court in **Mahlangu v CIM Deltak, Gallant v CIM Deltak** (1986) 7 ILJ 346 (IC) at 357 A - F, still regarded as the leading case on the general requirements for procedural fairness by academic writers see, for example, Grogan **Workplace Law** Fourth Edition at p.147 fn 129) in the belief that these requirements are necessary to properly afford an employee an opportunity to state his or her case as required by Item 4 of Schedule 7 of the Act -**Code of Good**

Practice : Dismissals. Others (particularly those who gained experience as arbitrators in the IMSSA (Independent Mediation Service of South Africa) school tend to take a more flexible, robust and holistic view of the issue.

Thus, what constitutes adequate notice will vary from case to case and, I venture to add, from adjudicator to adjudicator. (See Cameron *The Right to a Hearing before Dismissal - Part 1* [1986] 7 ILJ 183 at p. 200; Grogan op.cit. at p. 147 and **Miksch v Edgars Retail Trading (Pty) Ltd** (1995) 16 ILJ 1575 (IC))

Some adjudicators may likewise deem an employer's failure to advise an employee of their right to an appeal to be unfair, even though the Code does not specifically make mention of it, particularly where such a procedure exists in the employer's disciplinary code. (see Grogan op.cit at p. 146)

The Applicant submitted that, in addition to the Code not establishing a right to an appeal, the failure to advise Dlamini was also not procedurally unfair because Smith was the highest authority in the enterprise from whom there was no further appeal. The submission fails for two reasons. Firstly, it would only be relevant if there was documentation before the Court which establishes that this was the evidence before the Commissioner. The Applicant relies on the Founding Affidavit of Smith in this regard which merely states this as a fact and there is also nothing in the Commissioner's notes which suggests that this was adduced as evidence in the arbitration. Secondly, even if this was the evidence before the Commissioner, the Applicant, having provided for an appeal in its own disciplinary code, would still have had to convene an appeal hearing, had the Applicant so desired one, chaired, perhaps, by an independent outsider. The fact that the most senior employee of an organisation chairs the enquiry does not exempt an employer, who has chosen to afford employees the right to appeal in its own disciplinary code, from convening an appeal hearing. The purpose of an appeal is not to afford the most senior employee an opportunity to make the final decision but rather, as Cameron points out (in *The Right to a Hearing - Part 1* op.cit at p. 214) as:

¶An important safeguard, giving the affected employee a chance of persuading a second tier of authority that the adverse decision was wrong or that it should otherwise be reconsidered.¶

It would therefore be inappropriate for this Court to substitute its opinion for that of the Commissioner's in this case as far as the adequacy or otherwise of the notice period given and the failure of Smith to advise Dlamini of his right to appeal against the finding are concerned. Finding that the notice period was inadequate and that the Applicant ought to have advised Dlamini of his right to appeal, the Commissioner was justified in coming to the conclusion that the dismissal was procedurally unfair.

Whether the Commissioner was justified in coming to the conclusion that the dismissal was procedurally unfair because, in addition, Dlamini was not afforded an opportunity to cross examine his accuser, Blankers, whose evidence was submitted to the disciplinary enquiry by way of a statement, may be another matter, bearing in mind that Dlamini admitted the misconduct and therefore, as the Applicant points out in its Heads of Argument, no dispute of fact needed to be resolved and no credibility finding was necessary.

It has long been established that an employer is not expected to run a disciplinary enquiry with the same rigour as a formal court hearing and therefore the Commissioner's finding that the dismissal was procedurally unfair with regard to the Applicant's failure to call Blankers to give oral evidence may be irrational and not justifiable.

Were this the only ground on which the Commissioner relied to find that the dismissal was procedurally unfair, the award may well have failed the **Carephone** test. However, in view of my findings that the Commissioner was justified in finding that the dismissal was procedurally unfair for the other reasons given, it is not necessary to make a definitive finding regarding this particular alleged procedural irregularity.

Finally, the Applicant's representative argued that on all three issues, in order to establish whether the finding was justifiable, the Court must ask what purpose would have been served by allowing Dlamini more time to prepare, advising him of his right to appeal and allowing him to cross examine Blankers particularly in the circumstances of this case where Dlamini did not raise these issues. In other words, what difference would it have made had these rights been afforded him.

The right of adequate notice, the right to be advised of what recourse the

employer has made available to you once a decision has been taken to terminate your contract of employment (described as the equivalent of a death sentence) and the right to face your accuser in a disciplinary enquiry have value in and of themselves to ensure social justice and the maintenance of industrial peace. When an employer is found to have infringed these rights, a finding that the dismissal was not effected in accordance with a fair procedure is rational and justifiable irrespective of whether the employer's adherence to proper procedure would have made a difference to the final outcome.

As Brassey points out (in **Employment Law** Vol 10 No 5 112 *Another gulp for the ulp*):

|| Underlying the insistence on due process is a concern for sound decision-making. Requiring the employer to hear both sides of the story limits the harm that a wrong decision can cause, some of which may be quite beyond the remedial power of the court, and reduces the social cost that flows from unnecessary recourse to third party intervention. Also important is the value latent in the process itself; hearing others before acting against them is a mark of respect for their worth as people, for it impliedly conveys the notion that care is required in the determination of their fate and value is attached to the views they may wish to express on that question.!

The Applicant's application to have the Commissioner's award set aside is therefore dismissed with costs, including the wasted costs occasioned by the postponement of these proceedings on 26 February 1999.

Turning now to the Respondent's application in terms of section 158 (1) (c), it would be improper for the Court to make an award an order of Court when the award clearly flies in the face of express provisions of the Act and a decision of the Labour Appeal Court and which is couched in terms which make it impossible for a Writ of Execution to be issued and executed by the Sheriff of this Court.

The Labour Appeal Court has established in **Johnson & Johnson (Pty) Ltd v CWIU** [1998] 12 BLLR 1209 (LAC) that where an arbitrator or an adjudicator decides to award compensation because an employer did not follow a fair procedure, he or she is bound to compute that compensation strictly in accordance with the formula established in section 194 (1) of the Act. Compensation awarded must be equal to the remuneration which the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication nothing more,

nothing less@ (**Johnson and Johnson** supra at paragraph 40).

In his award, the Commissioner orders the Applicant to pay Dlamini an amount equal to five months' remuneration. *Ex facie* the award, Dlamini was dismissed on 24 September 1997. The arbitration, according to the Affidavit of the Respondent, was held on the 27 February 1998. Dlamini is thus entitled to an amount exactly equivalent to the remuneration he would have received between 24 September 1997 and 27 February 1998. In order to compute the amount the Commissioner was obliged to take evidence as to how much Dlamini earned at the time of his dismissal and to establish exactly how much he would have earned between 24 September 1997 and 27 February 1998 and to reflect that in the award in monetary terms.

The Court can only assume that the failure of the award to reflect this exact amount in money terms is an error on the part of the Commissioner.

It is therefore appropriate to postpone the Respondent's application to have the award made an order of Court to enable the Respondent, on notice to the Applicant, to apply to the Commissioner to have the award varied in terms of section 144 (b) of the Act. Once the award has been varied to accurately reflect the amount of compensation (in money terms) due to Dlamini, the Respondent can approach the Court, with the varied award, to have the application set down for hearing.

I therefore make the following order.

The Application to have the Commissioner's award set aside is therefore dismissed with costs, including the wasted costs occasioned by the postponement of these proceedings on 26 February 1999.

The application to have the award made an order of court is postponed *sine die* pending the outcome of the Third Respondent's application to the Commissioner to have the award varied in terms of section 144 (b) of the Labour

Relations Act.

I de VILLIERS A J Acting Judge of the Labour Court

Date of Hearing : 23 April 1999

Date of judgment : 11 June 1999

For the Applicant : Advocate P J Jooste
instructed by Nicholetts Attorneys

For the Third Respondent : Attorney S J Haskins