

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN
Case No: D343/98

In the matter between:

R J ARMSTRONG

Applicant

and

BARBARA ANNE TEE

First Respondent

CCMA

Second Respondent

YUNUS SHAIK

Third Respondent

JUDGMENT

JALI AJ

This is an application for a review in terms of section 145 and/or 158(1)(g) of the Labour relations Act No 66 of 1995 (herein after referred to as "the Act"). The Applicant has moved an application to set aside an award of the Third Respondent dated the 3rd of April 1998, under the CCMA case No KN8975.

The parties are Dr R J Armstrong ("the Applicant") and Barbara Anne Tee ("the First Respondent"), The Commission for Conciliation, Mediation and Arbitration ("the Second Respondent"), Yunus Shaik ("the third Respondent"). The Respondents have not filed a notice to oppose this application for a review. The court however is still obliged to decide whether or not the review should succeed even though it is unopposed. The court is required to apply its mind as to whether the award is reviewable in accordance with the provisions of the Act.

The Applicant, a medical practitioner, employed by the First Respondent, with effect from 1 June 1994, as an Administrative Assistant and later became a Receptionist until her dismissal on 3 October 1997. The facts leading to her dismissal are that on, Tuesday, 23 September 1997, on realising that she was not well, went off to visit another doctor who examined her and thereafter booked her off sick for a number of days. She did not tell the Applicant of the fact that she had been booked off sick as, according to her, she didn't want to disturb him, as he was busy with claim forms and she also did not want to cause herself some stress. The 24th of September 1997 was a public holiday. On the 25th of September 1997, she went to Johannesburg with her family to attend a soccer tour until Sunday, 28 September 1997. She had known about this soccer tour for about four to five months before the date of departure. On 25 September 1997 at approximately 7h00 her husband telephoned the Applicant to report that the First Respondent would not be coming to work because she had "women's illness" and she was resting. The Applicant opens his surgery at 7h30. On 25 September 1997 the Applicant had to close his practice as he could not arrange a replacement at such short notice. Patients were referred to another practitioner. Later that evening the Applicant learned, for the first time, that the First Respondent had gone on a trip to Johannesburg with her family for the weekend. The following day, the Applicant employed a computer consultant and two temporary employees, to manage the reception and the computer. The First Respondent was absent from 25 September 1997 to the 29 September 1997.

On 30 September 1997 the First Respondent reported for work. She produced a medical certificate from a Dr Baijnath, which confirmed that she had been booked off sick for the period 24TH of September 1997 to the 28TH of

September 1997. It was apparent that she had not reported for work on the 29TH of September 1997, even though her medical certificate did not cover that particular day. The Applicant contacted Dr Baijnath, and their conversation would be referred to later in my judgment. She was then charged, firstly, for being absent from work without a valid reason and secondly, dishonesty in that she lied about her absence from work being on account of illness but in fact had gone away on a trip. It was alleged that this impacted upon the trust relationship between an employer and employee. On 2 October 1997 a disciplinary enquiry was held. It was chaired by, a clinical psychologist, Mr Shaun Keegan. Mr Keegan recommended, amongst others, that the First Respondent should resign and the the Applicant should give the First Respondent one (1) month's notice pay on her resignation. The First Respondent subsequently was given the one (1) month notice pay together with her leave pay. The matter was subsequently referred to the Second Respondent, the CCMA, for conciliation and later arbitration before the Third Respondent.

The Commissioner's findings, as set out in the arbitration award, are as follows:

"In view of the medical certificate and the fact that the Applicant did not challenge the fact that, indeed, Barbara Tee was unfit for work. I find that the leave taken was justified. Notwithstanding the fact she was unfit for work, she had a duty to inform her employer timeously of this fact. In my view, she complied with the duty to give notice in that her husband informed the doctor at 7.00am in the morning of the fact that she would not be attending work. However, I have taken note of the fact that she absented herself without a medical certificate on the 29TH of September 1997. I reject the contention

presented by the Applicant that the mere fact that Barbara Tee journeyed to Johannesburg whilst she was on sick leave is proof of the fact that she was not ill or she perpetrated a deception. In the circumstances, I find that Barbara was dismissed for no good reason.

Accordingly, I make the following award.

AWARD

That Barbara Tee be paid a sum of R18 000,00, being the sum equivalent to six months' pay, on or before the 3rd of April 1998."

The grounds for review, which were raised by the Applicant in respect of the Third Respondent's award, are the following:

- (a) No reasonable arbitrator could have come to the conclusions which the Third Respondent did. The First Respondent was absent without leave on the 29th of September 1998, and a finding to that effect was made;
- (b) The First Respondent had acted dishonestly. An arbitration held in an acceptable and proper form would have come to this conclusion;
- (c) The Third Respondent gives no reason or basis on which he awarded the First Respondent R18 000,00 and it was submitted no such reason exists,
- (d) The arbitrator failed to take cognisance of the nature of the relationship between the Applicant and the First Respondent;
- (e) The First Respondent was dishonest at the arbitration and no finding to this effect was made by the Third Respondent.

Section 145(1)(a) of the Act, stipulates that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to Labour Court for an order setting aside the arbitration award within six weeks of the date that the award was served on

the Applicant, unless the alleged defect was corruption.

Section 145(2) of the Act provides that "a defect referred to in sub-section (1) means:

- (a) That the Commissioner:
 - (i) committed misconduct in relation to the duties of the Commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings, or
 - (iii) exceeded the Commission's powers, or
- (b) That the award has been improperly obtained.

There are a number of judgments of this court dealing with the review of arbitration awards either in terms of section 145 or section 158(1)(g) of the Act. The uncertainty as to whether the award should be reviewed in terms of section 145 or section 158(1)(g) has since been resolved in the matter of Carephone (Pty) Ltd and Marcus N.O. and Others 1998(11) BLLR 1093 (LAC) and also (1998) 19ILJ 1425 (LAC) in which the Court confirmed that the review of arbitration awards must be under Section 145 of the Act.

Accordingly, the reference to Section 158(1)(g) by the Applicant in this matter is incorrect. However, this court would condone same as the papers were issued before the abovementioned judgment was delivered by the Labour Appeal Court.

In the aforesaid judgment, FRONEMAN DJP, at 1099H, had this to say about the constitutional imperatives for arbitrations held in terms of the Act:

"[20] The constitutional imperatives for the compulsory arbitration under the LRA are thus that the process must be fair and equitable, that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of

those reasons and that it must be consistent with the fundamental right to fair labour practices." (my own emphasis)

He then went on to state, at pages 1011I to 1102A, that:

"[31] The peg on which the extended scope of review has been hang is the Constitutional provision that administrative action must be justifiable in relation to the reasons given for it. (Sections 33 and item 23(b) of Schedule 6 to the Constitution). This provision introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review or rationality only as evidence of procedural impropriety."

At pages 1102 H – J he went on to pronounce that:

"[35] When the constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to just or correctness.

[36] 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."

The evidence which was led at the arbitration, from my reading of the transcript of the arbitration hearing, shows that at pages 50 to 52 of the record, that the Applicant challenged the First Respondent's condition on the 23rd of September 1997. In his evidence he started by explaining what the abbreviations "PID" and "UTI", which were written in the First Respondent's medical certificate, stand for. He stated that "PID" is an infection in the

uterus and fallopian tubes of a woman and "UTI" is an infection in the urinary track. He further stated that the First Respondent "appeared fine" and she "appeared far from crippled". He didn't notice any difference and she was her normal self on the 23 September 1997. The Applicant confirmed that he would have observed if there was something wrong with her. She then went on to state that one of the hallmarks of a bladder infection is that you go to the toilet every ten minutes. You have this intense urge to pass urine. According to the Applicant, she would have definitely noticed that sort of symptom, as they do not have a toilet in their practice. You have got to leave the surgery and go across the passage for you to find a toilet. He would definitely have noticed if it happened. In the circumstances he had no reason to believe that the First Respondent was physically ill on the 23rd of September 1997

Also, at pages 52 and 53 of the record, the Applicant did express his unhappiness about Dr Baijnath's findings regarding the First Respondent's condition. His evidence about their conversation on 30 September 1997 was as follows:

"COMMISSIONER: Okay, let's go on. I contacted Dr Baijnath and she explained that she had originally only given Barbara a certificate from 24th to 26th, but that Barbara had persuaded her to include ... [intervention].

COMMISSIONER: Hold on. You contacted Baijnath – gave her a certificate for the 24th to 26th?

WITNESS: 26TH, ja.

COMMISSIONER: Right, okay. Only?

WITNESS: Yes.

COMMISSIONER: But was persuaded?

WITNESS: Barbara had persuaded her to include the weekend. The 26th was the Friday and of course she doesn't work anyway.

COMMISSIONER: Yes?

WITNESS: I did not challenge Dr Baijnath as to what was wrong with Barbara, I felt it would have been an invasion of patient-doctor relationship. And I also did not in any way want to give - I did not want to affront Dr Baijnath's professional ... (indistinct). So I stayed away from the actual whys and wherefors. And I did ask Dr Baijnath whether she felt Barbara was so ill that she would have been able to travel to Johannesburg or to Transvaal for the weekend. And Dr Baijnath was extremely surprised to hear that Barbara had gone away. She was also surprised that Barbara had not presented herself at work on Monday the 29th. This is a recollection that Dr Baijnath had distinctly and Dr Baijnath was quite amazed that Barbara had not been at work on that day at all."

In my view, it is clear that the Applicant did express his doubts about the diagnosis of the First Respondent by Dr Baijnath during the hearing. It is apparent from his evidence that he was not satisfied with the contents of the medical certificate. However, he had not raised it with Dr Baijnath because of ethical constraints. If the Commissioner was concerned about the admissibility of parts of this evidence, then he should have called Dr Baijnath, as he had elected to follow the inquisitorial system. Alternatively, he should have alerted the Applicant about it, so that he could make his own choice, if he would have known what to do as his representative had been excluded from the process. Accordingly, I cannot reconcile the Commissioner's finding

with the evidence which was contained in the record, that is to say that the condition of the First Respondent was never challenged by the Applicant. He may not have said it in so many words or as a lawyer would, but he did.

The Commissioner then went on, in his arbitration award, to note that on the 29th of September 1997 the First Respondent was absent without a medical certificate. That, on its own, is a punishable offence. However, in his award, he does nothing about it. He merely notes it and moves on to make an award without dealing with that particular aspect. Absenteeism without a valid medical certificate or an explanation is a serious offence, especially if one takes into consideration the overall evidence which was presented in arbitration that the very same employee had travelled to Johannesburg whilst she had been booked off sick by her doctor. The Second Respondent, clearly, did not attach any weight to this evidence.

Furthermore, the Commissioner goes on to make an award, disregarding a number of aggravating factors with regard to the employee's conduct. Firstly, she knew that the Applicant was a single practitioner, he ran a busy practice and relied heavily on her. Secondly, on the 25th of September 1997, the Applicant had to close his practice because of the First Respondent's absenteeism. Thirdly, the First Respondent never reported timeously that she would be absent even though she knew months before about the tour or, if one is benevolent, as early as the 23rd of September 1997 that she would not be reporting for work on the 25th of September 1997. Fourthly, she never made contact with the Applicant when she knew that she had to stay in touch with her employer when she is absent from work because he totally depended on her. In her own evidence, when testifying in relation to her last

absenteeism in July 1997 she confirmed that, she knew that she was expected to remain in contact with the Applicant when she was off sick. This had been raised with her after her absenteeism following upon her visit to the Grahamstown Arts Festival. Fifthly, the Applicant only learned about the fact that the family had gone for the weekend from the First Respondent's maid. There is no evidence to suggest that she would have told the Applicant the truth at any stage. What the First Respondent did not tell the Commissioner is why she did not ask her husband to tell the Applicant that they were actually going off on a soccer tour when her husband called to report that she would not be coming to work on the 25th of September 1997. If her only concern was the fact that if she called the Applicant, that would have put a lot of stress on her, then there is no reason why her husband could not have made that telephone call if she was interested in being honest with the Applicant and telling him exactly what she was up to. In the circumstances, she could not have been honest when she testified in the arbitration (as set out in the Commissioner's award) that "*she was unable to inform the Applicant in advance that she would be on sick leave*". Furthermore, there is no basis for the Third Respondent's findings that she complied with the duty to give notice because her husband called on the morning of 25 September 1997 to report that she would be absent. The visit to Dr Baijnath was during working hours on 23 September 1997. Giving notice, surely, means adequate notice. I would also go on to state that it should be given when the first opportunity to do presents itself.

Furthermore, she travelled to Johannesburg whilst ill. She returned on Sunday 28 September 1997 and there is no plausible reason why she did not come to work on 29 September 1997. Whatever the reason was for not

coming to work on 29 September 1997, that could have been attended to at lunch time on that day. Notwithstanding that the Commissioner found that the leave taken was justified.

He also attached no weight to the Applicant's evidence that, as a result of the First Respondent's absence, he suffered financially, because he had to close the surgery on the first day and employ staff on the second day. This was done notwithstanding a previous arrangement which had been made with the First Respondent about how she should deal with absenteeism in future.

In light of the foregoing, I find that the Commissioner's findings with regard to the question of absenteeism by the First Respondent, that is both over the weekend and on Monday, 29 September 1997, are not rationally justifiable if one takes into account the evidence which was presented at the arbitration hearing. Actually, he made no finding at all with regard to the First Respondent's absenteeism on the 29th of September 1997.

I would now like to turn to deal with the payment of R18 000,00 which was awarded by the Commissioner. Section 33 read with Item 23(2) of Schedule 6 to the Constitution of the Republic of South Africa (Act No 108 of 1996) provides that:

"23(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new constitution as enacted: ...

(b) Section 33(1) and (2) must be regarded to read as follows:

Every person has the right to

(a) Lawful administrative action where any of their rights or interests is affected or threatened;

(b) Procedurally fair administrative action where any of their rights or legitimate

expectations is affected or threatened;

(c) Be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public, and

(d) Administrative action which is justifiable in relation to the reasons given for it, where any of their rights is affected or threatened."

It is apparent from the aforesaid provisions of the constitution that a person performing an administrative action, is under an obligation to furnish reasons to the parties for his decision. A Commissioner, who is sitting as an Arbitrator is performing an administrative act, see Shoprite Checkers (Pty) Limited v CCMA & Others (1998) 5 BLLR 510(LC) at 517F-G. Accordingly, a Commissioner should give reasons for his award. It is a known fact, by triers of fact that in writing awards or writing judgments, every effort is being made to ensure that the award or judgment is written to explain to the losing party why he has lost that particular case or arbitration.

Contrary to known and accepted practice, the Commissioner in this case went ahead and awarded R18 000,00 to the employee, without furnishing any reasons, as to why the R18 000,00 is being awarded. As a result, even at the time of the hearing of this application, the Applicant did not understand why the R18 000,00 was awarded. Consequently, the Applicant's representative referred to this R18 000,00 as a "thumbsuck" by the Third Respondent. I also fail to understand the basis of the aforesaid award of R18 000,00 as it is clear from the evidence which is before me that on 3 October 1997 the First Respondent was paid one (1) month's salary in lieu of notice in accordance with the recommendations of Mr Keegan. In light of what I have said above, I am of the view that the Commissioner's award, as set out

above, was arbitrary and does not meet fair labour practices, as envisaged in Carephone (Pty) Limited v Marcus N.O., above, and also fair administrative justice, as pronounced in our constitution.

In dealing with the stringent standards contained in Section 33 of the Constitution disputes, PRETORIUS AJ, in Shoprite Checkers (PTY) Ltd v CCMA and Others above at 517I – 518A said:

"Not only the interests of justice, but also sound labour relations may well be better served by arbitration decisions which comply with the standards implicit in section 33 of the constitution than by arbitration decisions which do not necessarily comply with the standards, but serve to end labour relations disputes more speedily."

I agree with the sentiments of PRETORIUS AJ in this regard.

I would now turn to deal with an issue which was also raised by the Applicant and also the Applicant's representative during argument, the fact that the Commissioner did not give the Applicant an opportunity to call any witnesses or to cross-examine the First Respondent so as to deal with the dishonest statement made by the First Respondent.

It is apparent that the parties, when they came to the arbitration hearing, had legal representatives. However, the Commissioner suggested or recommended to them that the matter can be resolved without legal representatives and accordingly an agreement was reached to the effect that there would be no representation and the Commissioner would deal with the matter. The Commissioner then, on his own accord, dealt with this matter in an inquisitorial manner. He started by a brief explanation of the inquisitorial procedure. Then he asked the Applicant to explain what happened in this matter. The Applicant stated his version. Thereafter, he went on to ask the First Respondent to put her version, and that was the end of the evidence.

On the face of the record of the hearing, it is apparent that no explanation of the rights was given to the parties, nor was the Applicant asked whether he

wished to cross-examine the First Respondent or to call any other witnesses. The request to call witnesses emanated from the Applicant. It is apparent, in the record, that the Applicant, on more than one occasion, asked to call witnesses. At all times this request was not adhered to by the Commissioner. The first time the Applicant asked to call a witness, the Commissioner did not respond to that request. On the second occasion, there was quite an exchange between the Commissioner and the Applicant when the Applicant asked to call a witness. The Commissioner enquired whether the calling of that particular witness would take the matter anywhere. The witness was to testify about the date when the First Respondent had been absent, after attending the Grahamstown Festival. What was discussed on the said day by the Applicant and the First Respondent was not in dispute. The only thing in dispute was the question of the dates. I do not believe that calling that particular witness would have taken this matter anywhere.

Even though I do agree with the fact that with regard to these two particular incidents, there was no need for that particular witness to be called, I still believe that a Commissioner should be careful of the fact that an unrepresented litigant might easily be dissuaded from making any further requests to call witnesses if his or her requests are declined all the time or without giving reasons. The unrepresented litigant might actually think that he is not allowed, at all, to call witnesses in the arbitration.

I have already mentioned the fact that the parties were unrepresented at the request or recommendation of the Third Respondent at the arbitration hearing. This is a fact which the Third Respondent should have taken into consideration in dealing with the parties and also in deciding whether to allow them to call witnesses or not. In this regard, he should have taken

cognisance of the fact that the parties are unrepresented and every care should be taken in ensuring that they are satisfied with the process at the end of the day, that is, they have been given an opportunity to lead whatever evidence which they wanted to present. One should not forget the well-known principle of our law that "Justice must not only be done but must also, be seen to be done". See R v Rall 1982 (1) SA 828 at 831H (AD) and S v Sallen 1987 (4) SA 772. In S v Selemana 1975(4) SA 908 at 909 (TPD), FRANKLIN J stated:

"A magistrate must be exceptionally careful when refusing to allow an accused to call a witness. In particular, when the accused is unrepresented, the magistrate, before refusing such a request, should make certain that such a witness cannot possibly give relevant evidence. If the court is not careful to observe this obligation, a miscarriage of justice may result: S v Tembani 1970(4) SA 395 (E). Indeed, the denial of such an opportunity is in itself a gross irregularity in the proceedings: District Commandant, South African Police and Another v Murray 1924 AD 13 at page 18; S v Vezi 1963(1) SA 9 (N) at page 12."

I am in full agreement with the views of FRANKLIN J stated above. I do believe that the same principles should apply in labour matters, especially in those matters in which the parties are unrepresented, as it is normally the case, in matters before the CCMA.

Sections 138(1) and (2) of the Act state that:

- "(1) 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.
- (2) Subject to the discretion of the Commissioner as to the appropriate proceedings, a party to the dispute may give evidence, call witnesses, question the witness of any other party, and address concluding arguments to the Commissioner."

The Applicant also testified in his affidavit that he believed that he should have been given an opportunity to call Dr Baijnath, to the CCMA hearing. The above-mentioned Section 138(2) has been interpreted to mean that the Commissioner has a discretion to decide as to whether to call witnesses or not. Notwithstanding the aforesaid discretion of the Commissioner, the said discretion must be applied judiciously. I agree with the Applicant that Dr

Baijnath should have been called. If the Applicant was not allowed to call Dr Baijnath, the Commissioner, then should have considered calling Dr Baijnath himself. I have already expressed a view on this. There were a number of queries which could have been clarified by Dr Baijnath for him to reach an appropriate decision in this matter. The issue of whether it was the First Respondent who requested the medical certificate to include Saturday, the 27th and Sunday, the 28th of September 1997 or was it Dr Baijnath who decided to do so on her own accord; Dr Baijnath's diagnosis and prognosis of the First Respondent. (was it stress as alleged by the First Respondent or was it the infection as stipulated in the medical report). These issues were of significance in light of the Applicant's evidence, relating to the First Respondent's condition on Tuesday, 23 September 1997, and the First Respondent's evidence.

Section 138(1) of the Act has been interpreted to mean that Commissioners can proceed to deal with a matter before them in an inquisitorial manner. However, I would like to sound a word of warning that, if a commissioner proceeds to deal with the matter in an inquisitorial manner, the inquisitorial system, should be followed by a Commissioner who is prepared to go beyond the Arbitrator's normal role of holding the scale between the contending parties to determine in which way the balance tilts, (see Hamman v Moolman 1968(4) 340 at 344D-H) and be fully involved. This involves, *inter alia*, taking control and responsibility for the direction of the proceedings, including, calling for evidence and witnesses, asking relevant and searching questions to get to the truth. I do not believe that it happened in this matter.

Notwithstanding that I still do not believe that the right to cross-examination should be excluded under those circumstances. If a party attending a hearing is familiar with the facts, he is the one who is best equipped to

identify inconsistencies as well as contradictions which might be told by the other party. Accordingly, he should be given an opportunity to cross-examine the opposing party.

It is trite that the purpose of cross-examination is to elicit evidence which supports the cross-examiners case and to cast doubt upon the evidence given for the other side. It is one of the most powerful and valuable weapons for purpose of testing the truthfulness of a witness and the accuracy of his testimony before a court or tribunal. WIGMORE has called it the greatest engine ever invented for the discovery of truth. See *THE SOUTH AFRICAN LAW OF EVIDENCE* (4th edition) page 456. In *MAY : THE SOUTH AFRICAN CASES ON STATUTES AND EVIDENCE*, the author had this to say about the effectiveness of cross-examination:

“For cross-examination has the inestimable advantage of being able to extract from the mouth of the untruthful, the mistaken or the forgetful a correction of their own assertions, to test the means of knowledge and memory, to expose bias, to turn a new angle upon one-sided impressions, to emphasise inconsistencies and expose contradictions, to sift where too much has been said, to expand where too little, to supply omissions, to search out what is concealed and to focus the fierce beams of truth into every dark corner”.

(c.f. The State v Nkabinde 1998 (8) BCLR 996 (N) at 1004.

Accordingly the removal of this potent weapon from any litigant, cannot be condoned.

I do agree that a mere omission by the Commissioner to record or mention that he explained to the parties their rights to call witnesses and to cross-examine witnesses if, in fact, it took place, is not necessarily fatal. See Rex V Sibiyi 1947(2) SA 50 (AD) and also S v Vezi 1963(1) at 11. In *casu* the record

does not show that, there was an omission to record it but there is evidence to the contrary.

I am also aware of the provisions of section 138(1) of the Act, which stipulates that the Commissioner may conduct arbitration in the manner that the Commissioner has considered appropriate in order to determine the dispute fairly and quickly and must be with the minimum of legal formalities. However, in so doing, I would like to indicate that even though it might be that the Commissioner wants to deal with this dispute in a expeditious fashion, in so doing, he should not overlook the primary objects of the Act, as contained in Section 1 of the Act. Section (1)(d)(iv) states that the purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are, to promote, the effective resolution of labour disputes. I would place an emphasis on the effectiveness of the dispute resolution. It could be that the Third Respondent was more concerned about the speedy resolution of the dispute, but the speedy resolution should also be an effective resolution of the labour dispute. The matter has been referred to this particular Court because the Applicant feels that the resolution of the dispute was not effective.

The Applicant has also raised an allegation of bias against the Commissioner. I have considered this allegation. In so doing, I have also perused through the entire record and I could not find anything in the record to suggest that there was such bias.

Accordingly, I find that the Third Respondent's decision is reviewable on the four grounds, namely, the failure of the Third Respondent to call Dr Baijnath as a witness, the failure to allow the Applicant to cross-examine the First

Respondent, the failure by the Third Respondent to give reasons for the award of R18 000,00, and the failure by the Commissioner to give an award which is rationally justifiable on the basis of the evidence which has been presented before the arbitration.

I accordingly make the following order:

- (a) The arbitration award which was given on the 3rd of April 1999, under CCMA case No KN8975, is hereby reviewed and set aside;
- (b) The matter is referred back to the Commission for Conciliation, Mediation and Arbitration, to be arbitrated by another Commissioner other than the Third Respondent, and
 - 1. I make no order as to costs.

JALI A.J.

ON BEHALF OF APPLICANT:

MR DUNSTAN FARRELL
of Shepstone and Wylie, Durban.

ON BEHALF OF RESPONDENTS:

NO APPEARANCES

DATE OF HEARING:

25 MAY 1999

DATE OF JUDGMENT:

17 JUNE 1999

PLACE OF PROCEEDINGS:

DURBAN