

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN JOHANNESBURG

NO **JR20/2001**
and **J53/2001**

[Matter argued and judgment
reserved on 3/10/01]

In the matter between:

TELKOM SA

Applicant

and

CCMA & OTHERS

Respondents

ON BEHALF OF APPLICANT

MS U NUNES

ON BEHALF OF RESPONDENT

MR N H MAENETJE

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N TGERING A]

- [1] This case presents an unusual and interesting feature: after the chairman of the disciplinary hearing had imposed a sanction, namely, an alternative to dismissal, this lesser sanction was changed to a dismissal at a subsequent proceeding described as an "in-house conciliation".
- [2] The matter was argued before me on 3 October and I reserved judgment on that day. There were two applications before the Court, namely:
- (a) an application by the respondents (the union and the employee) to make an arbitration award dated 14 December 2000 an order of Court. In the arbitration award the arbitrator, acting under the auspices of the CCMA, found that the dismissal of the second respondent by the applicant was both procedurally and substantively unfair. The arbitrator ordered that the applicant reinstate the second respondent retrospectively, without forfeiture of any salary or benefits. The applicant failed to comply with the arbitration award and as a result the second respondent brought an application to make the award an order of Court.
- (b) The second application was an application brought by the employer (the applicant) in terms of section 145 of the Labour Relations Act, 66 of 1995, (the "Act") for the Court to review and set aside the arbitration award of 14 December 2000.
- [3] Heads of argument were filed on behalf of both sides and I found the heads by counsel for the respondents to be particularly helpful.
- [4] The arbitration award dated 14 December 2000 appears in the bundle twice, at

pages 7 - 24 and at pages 70 - 87. (Page references to the Bundle will be denoted by the capital letter "B" followed by the relevant page number).

- [5] The misconduct alleged against the employee related to a lockout which occurred during September 1999. The employee was employed at the Lenasia branch of the employer (the Lenasia yard). The second respondent had been an employee of the applicant for over twenty years. [See B247 and B338.] He was also senior shop steward at the Lenasia yard.
- [6] Following the lockout, the applicant initiated a disciplinary inquiry against the second respondent. The disciplinary inquiry was held on 29 November 1999. The applicant alleged that the second respondent had intimidated and threatened certain persons during the lockout. Four counts of intimidation were brought. At the end of the disciplinary inquiry the chairperson found that the second respondent was guilty on two of the four counts, namely:
- (a) the intimidation of Andy May (the overall manager of the Lenasia yard),
 - (b) the intimidation of Vincent Jacobs on 16 September 1999. Vincent Jacobs was a member of the management, being a supervisor.
- [7] The chairperson of the disciplinary inquiry then imposed a sanction of "dismissal or ten days' suspension as an alternative". If the second respondent did not "accept the suspension as an alternative", the dismissal would come into effect from 29 November 1999 as his last day of service in Telkom.
- [8] It is common cause that the second respondent elected to take the ten day suspension, being an alternative to dismissal, and did not report for work for ten

days. He returned to work on 13 December 1999 at different premises of the employer, namely the Braamfontein-IFMC yard.

[9] It is clear on the evidence that the employee had accepted the alternative to dismissal. [See B226 and B228-B229.]

[10] Thereafter an "in-house conciliation" was held on 13 January 2000. This is dealt with in the arbitration award [B10 - B18].

[11] At the end of the in-house conciliation, the chairperson of the disciplinary inquiry (who was not the chairperson of the in-house conciliation) dismissed the second respondent on the basis that by challenging the finding of guilt, the second respondent had changed his mind about the acceptance of the alternative sanction of a ten day suspension and as a result the dismissal became operative automatically as from 29 November 1999.

[12] The arbitrator, having considered the evidence relating to the in-house conciliation, held [B19] as follows:

"I, therefore, find that there was no procedural fairness of the in-house conciliation as it simply had no jurisdiction to implement a decision of dismissal."

[13] In my view, once the chairman of the disciplinary hearing had, on 29 November, given his award, and had given the employee an alternative to dismissal, the hearing was complete and the chairman was then *functus officio*, and it was thereafter not competent for the employer at the so-called "in-house conciliation" on 13 January to change the lesser sanction to one of dismissal. This was

especially so as the employee had clearly chosen the lesser sanction and had served the suspension period, and it had never been clearly explained to the employee that the "in-house conciliation" procedure gave rise to the possibility that the employee could be dismissed. Indeed, on no previous occasion had the in-house conciliation procedure resulted in such a consequence.

[14] As stated by the commissioner in his well-reasoned arbitration award:

"Neither an explanation nor an opportunity was given to the applicant at the in-house conciliation meeting suggesting to him that he runs the risk of being dismissed. By the chairperson nodding his head to confirm what he believed to be the case is in my mind unfair. Nodding of the head at proceedings that can decide between a person being dismissed or not, brings into question not only the forum but also the chairperson."

He goes on to say that:

"If the purpose of the in-house conciliation is to correct possible procedural unfairness, then there was no reason for the meeting."

He then went on to say:

"The forum was not a forum for a person to be dismissed by the chairperson of a hearing. The reasons are simple. A disciplinary hearing is held specifically for that purpose."

[15] I agree with the reasoning of the commissioner. In my view the dismissal that was pronounced at the in-house conciliation on 13 January was not a dismissal in accordance with the fair procedure as envisaged and required by the provisions of the Act.

[16] As regards the question of substantive fairness, the distinction between an appeal and a review must be borne in mind. [See *Shoprite Checkers (Pty) Ltd v Ramdaw NO* [2001] 9 BLLR 1011 at 1038 para. 82]. The commissioner, in his well-reasoned and articulate award, has analysed the evidence and the probabilities in regard to the two counts of alleged misconduct found by the chairman at the disciplinary hearing. In my view he correctly held that the employer had not discharged the *onus* of proof under section 192(2) of the Act.

[17] Without going into detail in regard to the evidence and the analysis of the evidence and the probabilities I would point out that it is clear that the employee was at the management meeting at the time of the alleged misconduct on 16 September [See B21 and B304] and there were clearly improbabilities in the employer's case in regard to the allegations of intimidation. [See in particular the analysis of the evidence at paragraphs 10, 11 and 12 at B19-22.] I agree with the analysis given by the commissioner and in my view, on the evidence, the employer has not been able to discharge the *onus* resting on it under section 192(2) of the Act.

[18] As regards the objection made on behalf of the employer that new evidence, not led at the hearing, was being relied on by the commissioner, it is trite that the arbitration hearing is a complete re-hearing of the matter (See *Grogan Workplace Law*, 6th Ed. 304] and the arbitrator is not confined to the evidence led at the disciplinary hearing. See also the case of *DB Thermal (Pty) Limited v CCMA* [2000] 10 BLLR 1163 at 1168, para.22, where it is stated that the Act envisages a full re-hearing on the merits when an arbitration is conducted before the CCMA under the provisions of Section 136 of the Act.

As regards the date of the dismissal, I agree with the arbitrator's decision that it was 13 January. No dismissal took place on 29 November as the choice of an alternative to dismissal was given to the employee and the employee clearly accepted that alternative. The dismissal took place on 13 January when, at the so-called "in-house conciliation", the dismissal was pronounced, which I have held to be procedurally unfair.

[20] The employee resumed employment at the Braamfontein yard and it seems to me that none of the provisions of section 193(2) of the Act preclude the arbitrator from ordering the employer to reinstate the employee.

[21] In the result, in my view no grounds under section 145 were established to justify the setting aside of the award of the commissioner.

[22] I, accordingly, hold that the dismissal of the employer was both procedurally and substantively unfair and I, accordingly, order that the application under section 145 be dismissed with costs, and that the application to make the award an order of Court, be granted.

GERING AJ
ACTING JUDGE OF THE LABOUR COURT