

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR660/02

In the matter between –

KHULA ENTERPRISE FINANCE LIMITED *Applicant*

and

DR THAMI MADINANE *First Respondent*

K G MNGEZANA NO *Second Respondent*

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION *Third Respondent*

JUDGMENT

KENNEDY A J:

- 1] The applicant seeks the review of an arbitration award issued by the second respondent (referred to in this judgment as “the arbitrator”), who is a commissioner of the CCMA. In terms of the award, the arbitrator found that the dismissal of the first respondent (Dr Madinane) by the applicant was both procedurally and substantively unfair. The award ordered the applicant to reinstate Dr Madinane with twelve months back pay.
- 2] When first appointed by the applicant, Dr Madinane had reported to the managing director Mr Tati. The management structures were changed and a general manager, Mr Fisher, was appointed. Dr Madinane was now required to report to Mr Fisher rather than to Mr Tati. Dr Madinane was unhappy about this. There were a number of incidents for which he was disciplined. For the first series of such incidents he was issued with warnings. Dr Madinane lodged grievances against the chief executive officer and Mr Fisher which arose from his dissatisfaction at having to report to Mr Fisher and his relationship with him. Dr Madinane was thereafter charged with another series of disciplinary charges which were dealt with at an enquiry held during November 2000. This enquiry was conducted by an advocate independent of the organization, Advocate Mark Antrobus of the Johannesburg Bar. Management decided on this appointment in view of the seniority of the members of management

involved in bringing or defending the disciplinary charges and because there was no other member of management available.

3] At the conclusion of the lengthy disciplinary enquiry, Mr Antrobus found Dr Madinane guilty of two sets of charges as follows –

- three charges of insubordination and failure to obey lawful instructions issued by Mr Fisher to furnish certain reports and business plans; and
- two charges of gross negligence in failing to follow company procedures in binding the company to a lease agreement and without authority purporting to bind the managing director of the company as surety in his personal capacity.

4] Dr Madinane referred two disputes to the CCMA. The one related to his grievance against Mr Fisher which Dr Madinane contended was an unfair labour practice. The other dispute which he referred to the CCMA concerned his dismissal, which he contended was unfair both procedurally and substantively.

5] At the outset of the arbitration proceedings, Dr Madinane sought the joinder or consolidation of the two disputes in the same arbitration proceedings. This was refused by the arbitrator. After hearing the evidence adduced by both parties, and argument advanced on their behalf, the arbitrator handed down a lengthy award. He concluded that the dismissal was both procedurally and substantively unfair. In argument, counsel for the applicant submitted that the arbitrator's findings were flawed in various respects and fell to be reviewed and set aside.

PROCEDURAL FAIRNESS

- 6] Dr Madinane relied on two grounds for his attack on the procedural fairness of the disciplinary process. Both were upheld by the arbitrator.
- The first related to the appointment of the chairperson, Advocate Antrobus. It was contended that this was in breach of the applicant's disciplinary procedure and that Dr Madinane perceived him to be biased.
 - The second was to the effect that the applicant had denied Dr Madinane his right of appeal.
- 7] In relation to the first aspect, much reliance was placed by the arbitrator on the disciplinary procedure applicable to the applicant. That provided, in clause 6.7.3, that *"an appropriate level of manager acceptable to both parties shall chair the enquiry."*
- 8] It appears from the reasoning set out in the arbitrator's award that he found two defects in relation to the appointment of Advocate Antrobus:
- first, that the applicant had *"deliberately breached its own procedure"* by appointing an outside chairperson where it *"did not have a right to unilaterally determine who should chair the proceedings of the disciplinary hearing."* and
 - second, that because Advocate Antrobus had been briefed by the applicant's attorneys, Brink Cohen & Le Roux, *"this created doubt in the mind of Dr Madinane in respect of the independence and impartiality over this matter ... it is my view that a perception of bias was present."*

9] From the reasoning of the arbitrator it appears that he conflated the two issues and that the overriding consideration in his view was that there had been a breach of the disciplinary procedure. Indeed, the latter aspect appears to have been the decisive one as far as the arbitrator was concerned. This is apparent *inter alia* from the following statements in the award :

- *“It is my view that a perception of bias was present and that the hearing would not have been the one contemplated in terms of the provisions of the respondent’s internal procedure. In terms of the wording of the clause, the respondent is bound by the provisions of the disciplinary procedure. It therefore goes without saying that the respondent violated its own procedure and that itself renders the dismissal unfair insofar as the procedure is concerned.”*
- *“In terms of the aforementioned clause, the respondent did not have a right to unilaterally determine who should chair the proceedings of the disciplinary hearing which led to the dismissal of Dr Madinane.”*
- *“The respondent party made reference to various case laws [sic] such as De Villiers v Fisons Pharmaceuticals (Pty) Limited (1991) 12 ILJ 1033 (IC); SACTWU v Martin & Johnson (Pty) Ltd (1993) 14 ILJ 1033 (LAC); CWIU & Another v Hoechst (Pty) Ltd (1993) 14 ILJ 471 (IC) and Changula v Bell Equipment (1992) 13 ILJ 101 (LAC) and NEHAWU, Mwalo & Others v Director General of Agriculture and Minister of Agriculture (1993) 4 (12) (SALLR) 33 (IC). And further references made to the matter of Oliver v Foschini Group Ltd [1995] 8 BLLR 102 (IC). I must further point out that the wording of the clause of Khula’s disciplinary procedure is also significant in its interpretation. The respondent deliberately breached its own procedure and ignored reasonable objection by Dr Madinane.”*

10] The case law cited in the last passage quoted from the award was cited in argument by

the employer's representative, Mr Johan Olivier, in support of the proposition that the provisions of a disciplinary code must not be applied mechanically but an arbitrator or court must decide the matter ultimately on whether, having regard to all the circumstances, the procedure as followed was fair. Although the arbitrator recorded the cases cited, he does not in his award state anything which addresses their effect or deals with the central issue, namely whether the procedure as implemented was ultimately fair.¹ Section 188(1)(b) makes it clear that the procedural fairness requires a determination whether "*the dismissal was effected in accordance with a fair procedure.*" While a relevant consideration is whether an employer has complied with a disciplinary code, it is not exhaustive of the enquiry. The code merely represents guidelines and is not to be elevated to an immutable code which is to be applied rigidly and must apply regardless of the circumstances.

- 11] The arbitrator does not appear to have considered at all the reason why an independent advocate was appointed to chair the enquiry. There were sound reasons for doing so, in particular that the most senior levels of management were personally involved in the complaints and allegations against Dr Madinane and it was simply unrealistic to appoint anybody within management. None was available or able to handle a disciplinary enquiry with any level of detachment and objectivity in the circumstances. The code serving merely as a guideline, the employer was entitled to look outside the organization for somebody with appropriate expertise and objectively to chair the enquiry. This served the interests of both sides receiving a fair hearing. There is no basis for Dr Madinane's objection in this regard. His reliance on the provision of the code was misplaced. It did not provide that an employee had to approve the appointment of any person to chair the disciplinary enquiry. It merely

¹ In addition to the cases cited above, see *Highveld District Council v CCMA & Others* (2003) 24 ILJ 517 (LAC) para 15 and *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1711 (LAC).

provided that enquiries would ordinarily be chaired by a member of management, the level of which “*would be acceptable to both parties.*” In this case no level of manager was acceptable to management, for sound reasons as discussed above. There could be no reasonable objection to appointing an outsider in these circumstances.

12] The arbitrator appears not to have applied his mind to this at all. Nor did he get to grips with the true issue namely where the procedure as adopted was in some real and substantial sense unfair to Dr Madinane.

13] The failure by an arbitrator to appreciate and decide the true issue that he or she is called upon to determine is a gross irregularity which justifies the review and setting aside of an award. See in this regard the remarks of Francis A J (as he then was) in the *S A Revenue Service* matter² -

“It is crucial that an arbitrator who is conducting arbitration proceedings knows what the true issues are that he is called upon to determine. Where he issues an award which is based on a failure by him to appreciate the true nature of the issue before him, he commits a gross irregularity which vitiates the entire proceedings ...”.

14] Such a failure denies the parties their right to have the issues fairly determined. See in this regard the judgments of Zondo JP and Van Dijkhorst AJA in the *Stocks Civil* case;³ and of Nicholson J A in the *Milady’s* case⁴ and in the *Crown Chickens* matter⁵

² *S A Revenue Service v CCMA & Others* (2001) 22 ILJ 1680 (LC) paras 32 and 33.

³ *Stocks Civil Engineering (Pty) Ltd v Rip NO & Other* (2002) 23 ILJ 358 (LAC) paras 26 and 27, 51 and 52.

⁴ *Milady’s a Division of Mr Price Group Ltd v Naidoo & Others* (2002) 23 ILJ 1234 (LAC); (2002) 9 BLLR 808 (LAC) para 29.

⁵ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* (2002) 23 ILJ 863 (LAC); (2002) 6 BLLR 493 (LAC) para 58.

in which the following was stated –

“ ... *The arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order.*”

- 15] In the present matter the arbitrator in my view manifestly stopped short the enquiry. He appears to have concluded that non-compliance with the disciplinary code *ipso facto* meant that the process was unfair. He should have also considered the vital question of whether, notwithstanding such non-compliance, the procedure was nonetheless fair, i.e. whether the hearing conducted by Mr Antrobus granted the applicant a fair opportunity to present his case and to challenge the employer’s case against him.
- 16] Had the arbitrator properly considered this issue he should in my view inevitably have come to the conclusion that the process followed was indeed fair. It was a thorough enquiry at which Dr Madinane and his representative were given a full opportunity to present their case, both in evidence and in argument, and to challenge and answer the case presented on behalf of the employer.
- 17] There is furthermore no basis in my view for the arbitrator’s finding that Mr Antrobus should not have presided over the disciplinary enquiry because, in the words of the arbitrator “*a perception of bias was present.*” Whether there is a perception of bias is not the test. The true test as confirmed in the *SARFU* case⁶ is whether, seen objectively, there exists a reasonable apprehension that the Judge (or in this case the chairperson of a disciplinary enquiry) may be biased, as viewed by a reasonable,

⁶ *President of the RSA and Others v S A Rugby Football Union & Others* 1999 (4) SA 147 (CC).

objective and informed person having regard to the correct facts.

- 18] In the present matter there was no factual basis for any such apprehension to be regarded as reasonable. The mere fact that Mr Antrobus was briefed by a firm of attorneys at the instance of the applicant is neither out of the ordinary nor sinister. On the contrary, our law requires that practising advocates be briefed by attorneys as recently confirmed by the Supreme Court of Appeal in the *Competition Commission* matter.⁷
- 19] Accordingly, the arbitrator in my view had no factual basis or reasonable justification for his finding that it was procedurally unfair to appoint Mr Antrobus to chair the disciplinary enquiry.
- 20] The arbitrator also erred in relation to the final aspect of procedural fairness in finding that Dr Madinane had been denied the right to appeal. Evidence presented at the arbitration was to the effect that Dr Madinane was offered an opportunity to appeal or to refer the dismissal directly to the CCMA and he elected to adopt the latter course. There is accordingly no rational basis, having regard to the relevant evidence, to justify the arbitrator's conclusion that the employer "*denied the applicant a right of appeal contained in the procedure deliberately with an intention to ensure that Dr Madinane is no longer in its employ because in the past he has been successful in his previous appeal hearings.*" This fundamentally misconstrues or ignores material evidence.
- 21] Accordingly, I find that the arbitrator's findings on procedural fairness cannot be

⁷ *Commissioner, Competition Commission v General Council of the Bar of South Africa & Others* 2002 (6) SA 606 (SCA) para 11; *Society of Advocates of Natal v De Freitas & Another (Natal Law Society intervening)* 1997 (4) SA 1134 (N); *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T).

sustained.

SUBSTANTIVE FAIRNESS

- 22] Mr Boda, for the applicant, submitted that notwithstanding a lengthy and detailed summary of various evidence which was led at the arbitration, the arbitrator's award manifests a failure on his part to consider material evidence. There is little meaningful analysis of the evidence and a failure to get to grips with the real issues. Notwithstanding lengthy and thorough argument presented to the arbitrator (*inter alia* in the form of written submissions) the arbitrator fails to address or show any consideration of the real issues, the contradictory versions of certain witnesses and other considerations relevant to deciding which version to accept.
- 23] In my view this criticism of the arbitrator's award has merit. There is no real attempt by the arbitrator to deal meaningfully with the specific charges, in particular the individual charges of insubordination. He appears to ignore the common cause fact that Dr Madinane ignored certain instructions and fails to deal meaningfully with the issue of whether the instruction was reasonable and whether Dr Madinane had justification for failing to comply with it. Of particular concern was the third charge of insubordination. This related to non-compliance with an instruction issued by the Board. There was detailed evidence by both Mr Tati and Mr Fisher as well as from Dr Madinane himself, in which the latter made various concessions. None of this was dealt with in the award, which does not set out any factual findings by the arbitrator in relation to this charge whatsoever.
- 24] It appears that the arbitrator either ignored this evidence altogether or failed meaningfully to apply his mind to it and to determine the real issue at the heart of the

dispute namely whether Dr Madinane was insubordinate or whether he was justified in disobeying instructions. On either basis, the award cannot be justified rationally, having regard to the evidence that was put before the arbitrator and the reasons for the award.

- 25] I am accordingly satisfied that the arbitrator's conclusions in relation to the issue of substantive fairness cannot be sustained and fall to be set aside on review.

RELIEF

- 26] It is accordingly appropriate to set aside the award. Both parties submitted that it might be appropriate for this court to substitute its own decision on the merits rather than remitting it to the CCMA for a fresh arbitration to be conducted before a different commissioner.

- 27] In my view it would be inappropriate for this court on the papers to decide the matter on the merits. Although there is a full transcript of the arbitration proceedings, I do not have the benefit of seeing and hearing witnesses and observing their demeanour. Ultimately, the matter may turn on an assessment of the credibility of witnesses. In my view it would be appropriate to remit the matter to the CCMA for a fresh arbitration. It is also in my view appropriate that costs should follow the result.

- 28] In the result I make the following order –

a) The arbitration award of the second respondent dated 27 March 2002

is hereby reviewed and set aside.

- b) The dismissal dispute is referred back to the CCMA for arbitration proceedings to be conducted afresh before a commissioner other than the second respondent.*
- c) The first respondent is to pay the applicant's costs of this application.*

P M Kennedy

Acting Judge of the Labour Court

Date of hearing: *6 February 2004*

Date of judgment: *13 February 2004*

Applicant's counsel: ***Advocate F A Boda***

Instructed by: *Sihlali Molefe Attorneys*

First respondent's counsel: ***Advocate G Shakoane***

Instructed by: *Tshiqi Attorneys*