IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO J444/97

In the matter between :

KEVIN REEVES GIBB **Applicant**

and

NEDCOR LIMITED **Respondent**

CONSTITUTION OF THE COURT :

THE HONOURABLE ACTING JUDGE JALI A J

On behalf of Applicant :

ADV ETIENNE DU TOIT SC

instructed by Mendelow-Jacobs

On behalf of Respondent :

Adv PAUL J PRETORIUS SC

instructed by Shepstone Wiley, Durban
& Edward Nathan & Friedland Inc of Johannesburg

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This is an application in terms of Rule 7 of the Labour Court rules promulgated in terms of the Labour Relations Act No. 66 of 1995 ("the Act"). In terms of the aforesaid interlocutory application the applicant seeks an order in the following terms :

1. Declaring that the procedure envisaged under section 193 of the Labour Relations Act, 1995, in respect of the question as to whether a dismissal by an employer is fair or unfair is in the form of a review and not in the form of a new or fresh hearing;

2. Declaring that the procedure envisaged in section 193 of the Labour Relations Act, 1995, in order to determine procedural fairness of a dismissal of an employee by an employer is in the form of a review of such dismissal and not in the form of a new or fresh hearing;

3. Declaring that, in the review procedure envisaged in section 193 of the Labour Relations Act, 1995, procedural unfairness which accompanied the dismissal of an employee by the employer can be found to have been so fundamental that substantive fairness can follow from that as envisaged in section 194(2) of the Labour Relations Act, 1995;

4. Declaring that a party to the proceedings before the Labour Court may ask for a directive that the alleged procedural unfairness of a dismissal may be

considered separate from/..

considered separate from an alleged substantive unfairness when cogent and sufficient reasons for such separation are present;

5. Declaring that in the matter of Kevin Reeves Gibb v Nedcor Bank Limited (registrar of Labour Court No. J444/97) the question of

procedural fairness will be heard separate from the question of substantive fairness; and

6. Costs of the application.

The applicant, who was employed by the respondent as a General Manager; Credit, Personal Banking Division, was dismissed by the respondent on the 20th May 1997. He had joined the respondent bank on 1 December 1994. The reasons for charges which led to his dismissal are set out in a letter addressed to the applicant by the respondent dated the 6th May 1997. The letter read as follows :

Dear Sir

"Disciplinary Hearing

You are hereby required to attend a disciplinary enquiry that will take place at 08:30 am on Thursday 15 May 1997 at 100 Main Street in the 7th floor Boardroom.

You are charged with serious misconduct in your capacity as a general manager of the Bank, in that it is alleged that:

1. In respect/..

1. In respect of all or some of the business entities referred to on the schedule annexed marked "A", which schedule may be further amplified prior to your disciplinary enquiry;

1.1 you sanctioned credit on the basis of inadequate or unacceptable information; and/or

1.2 you failed, prior to the release of funds, to complete, or to require to be completed, the requisite documentation, (such as facility

applications and security documents); and/or

1.3 having specified, in certain instances, that security was required, you thereafter failed to ensure that adequate security was obtained for the credit facilities granted; and/or

1.4 you failed to ensure adequate segregation of managerial duties in the granting and management of credit facilities; and/or

1.5 you failed to comply with standing Bank rules, regulations or guidelines pertaining to the granting and management of credit; and/or

1.6 generally, by your negligent approval and/or management of certain credit facilities you failed to adequately protect the Bank's assets and/or underlying security and thereby placed the Bank at risk of suffering material

financial losses/..

financial losses.

2.In respect of various motor vehicles, which had been repossessed by the bank and which are listed on the schedule marked "B":

2.1you wrongfully used your position of authority to secure either the extended personal use, or the extended use for other persons, of such vehicles; and/or

2.2your wrongful conduct in 2.1 above prejudiced the debtor/client; and/or

2.3you wrongfully compelled directly or indirectly certain staff at Martindale Repossession Centre to comply with irregular instructions in relation to the conduct of their jobs; and/or

2.4by your behaviour, relating to repossessed motor vehicles, you placed

the Bank at risk of actual or potential financial losses and/or embarrassment.

3.In respect of various items of equipment which had been repossessed by the Bank and which are listed in the schedule marked "C":

3.1you wrongfully used your position of authority to secure the release of such equipment for

internal use/..

internal use; and/or

3.2you failed to follow the correct procedure for the disposal of such assets to ensure fair value was obtained therefor; and/or

3.3by your behaviour, relating to repossessed equipment, you placed the Bank at risk of actual or potential financial losses and/or embarrassment.

4.In respect of Stand 21 Blackheath (9 Lee Road) which you purported to purchase from the Bank on 10 December 1996 for R305 000,00:

4.1you have to date failed to sign the sale agreement despite various demands; and/or

4.2you or persons acting on your instructions have demolished the improvements on the property without the consent of the Bank; and/or

4.3you failed to disclose or to seek permission from the Bank for the fact that a development of the property has commenced in conjunction with Amberfield, a customer of the Bank; and/or

4.4by your general behaviour regarding the property and by, in particular, causing the improvements to be demolished, you have reduced

the value/..

the value of the property and have placed the Bank at risk of actual or potential financial loss and/or embarrassment.

5.In respect of Motheo Construction (Pty) Ltd:

5.1you maintained a stock of that company's letterheads in your office in Nedbank, on which you instructed Carol Doyle to draft a letter purporting to emanate from Motheo Construction (Pty) Ltd; and

5.2you instructed Caron Doyle to scan or copy the signature of the sole director of that company, Dr C T Ndlovu, onto such letter; and

5.3by your behaviour generally, you wrongfully created a perception, either that the Bank was involved in a joint venture with Motheo Construction (Pty) Ltd, or that the Bank was assisting Motheo Construction (Pty) Ltd in the conduct of its business, as it pertained to the Mpumalanga Housing Project.

6.Notwithstanding your suspension and a direct instruction that you not participate in a function/meeting in Mpumalanga province on 24 April 1997, you continued with your active participation.

7. Notwithstanding/..

7.Notwithstanding having been requested to return all Bank documents and letters in your possession, you have failed or refused to do so;

8.Your conduct in respect of those charges referred to in 1, 2, 3, 4, 5, 6 and 7 above, which are either proved or admitted, will result in an irreparable breakdown of the trust relationship essential for any senior

managerial position.

You have the right to be represented by either a willing Bank employee of your choice or a recognised trade union representative. No legal representation will be allowed.

You have the right to call witnesses in your defence and to cross-examine any witnesses called by the Bank.

Please note that all or any of these charges may be amended, amplified or added to on reasonable notice to you.

Yours faithfully

M J LEEMING
EXECUTIVE DIRECTOR

The annexures/..

The annexures to the letter of the 6th May contained the following information :

ANNEXURE A

Harris Ceilings Gauteng (Pty) Ltd

CTS Plumbing (Pty) Ltd

Enviro Options (Pty) Ltd

Motheo Construction (Pty) Ltd

Dri Block (Pty) Ltd

Thaba Manzi Game Farms (Pty) Ltd

Thaba Manzi Wildlife Services (Pty) Ltd

Oakley Carriers CC

P S Swanepoel

Spartan Resources CC

D C Campbell t/a Petts Stores

B N Nene

Adprops 1046 CC

/..

ANNEXURE B

MARTINDALE REPOSSESSION CENTRE

VEHICLES USED BY K GIBB & INSPECTION QUERIES

VEHICLE MAKE	REG NO.	I/C ACCOUNT	CLIENT
1. RANGE ROVER	SNZ962T	2494670002	ANSLEY R E
2. NISSAN PATROL	SLS998T	16270580002	ROLAND GAROS PROP
3. JEEP CHEROKEE	THG120T	1694138001	PHIRI C E
4. LAND ROVER	SPJ785T	14557960001	HAASBROEK A J B

DEFENDER HILINE			
5. AUDI CABRIOLET	CY344722	7655380002	LOURENS T C C
6. VW JETTA	TPC811T	19982420002	HIBBERT R
7. HYUNDAI ELANTRA	TPF259T	19336550001	BOSCH Z E
8. BMW 381I	RYJ113T	12507600001	THURLEY D

The charge-sheet also reflected that:

(a) Motor vehicle no. 5, namely, Audi Cabriolet belonging to Lourens T C C was still out and had not been returned to the Martindale Repossession Centre as at the date this letter was written.

(b) The gate passes in respect of motor vehicle numbers 1-4 were released to K Gibb.

(c) The Oedometer Readings, Valuation Report, Repossession Reports, Gate Passes and Vehicle Control Sheets.

I have extracted only the information which I thought might be relevant for purposes of this judgment.

ANNEXURE C

NEDCOR BANK REPOSSESSION CENTRE
Identified Computer Equipment held by
Personal Banking Credit 120 End Street

CLIENT	ACCOUNT NO	DATE REPO	MAKE	D
Mokgokong T E	14867050001	31/10/96	Mercer	P Mon
Withoff & Hardy	8475500001	27/11/96	No Name Panafax Allech	C F L
Stefcor Boddery	12703700001	08/06/94	Arcy	M
Brink L	16811170001	19/06/96	Mimaki	M

				/
Moodley P	16811170001	14/10/96	No Name Hewltt Pack	P M I
Fourie S	185219100001	10/10/96	N/K	M
Siyavaya Tours	188934600001	29/11/96	Canon	P i P M H
Bandasie J	18399690001	10/12/96	Mercer	P P M H
Claasen A N	15207090000	13/12/96	N/K	1 3 (1 1
Winners Advertisi ng	17417569001 17003750002	31/07/96 04/07/96	Apple N/K	C P M
School NYDE	14497530003	09/07/96	Mercer IBM Sendon N/K N/K	P M I P U C 5
Ex Nedbank/ Nedfin				F u G i F (M

The applicant stated that he was dismissed as a result of the worsening relationship between himself and

Mr M Leeming, the executive director of the respondent because inter alia, he had raised concerns about under-provision for bad debts. This

led to the allegations which were made against him which are set out in the letter dated 6 May 1997. In his affidavit, Mr Leeming denies that the applicant was charged as a result of the worsening relationship between him and the respondent. Mr Leeming stated that the entire investigation which led to the dismissal came about pursuant upon him receiving reports towards the end of March 1997 suggesting that the respondent should investigate the applicant's role in a company called Motheo Construction (Pty) Ltd ("Motheo"). When this investigation was done it was ascertained that the applicant had granted Motheo an overdraft facility of half a million rand and an instalment credit facility of R1.2 million. The granting of the said credit facility to Motheo had been done by the applicant in contravention of a number of respondent's credit policies and procedures. This is denied by the applicant. Mr Leeming then requested the applicant to furnish him with a report relating to Motheo and he received what he termed as a unsatisfactory report on the 7th April 1997 to which he replied on the 8th April 1997 and highlighted his need to know what the

respondent's involvement/..

respondent's involvement and commitment was in the housing project. In his letter of the 8th April 1997 he set out specific questions which he wished answered and called for a meeting on the 9th April in his office. The meeting was subsequently postponed to the 14th April 1997 at the applicant's request. However, on the 7th and 10th April 1997 Mr Leeming received two letters from Enviro Options (Pty) Ltd and Dri Block (Pty) Ltd in which concerns were expressed about the applicant's dual role as a bank manager and the developer's spokesperson in respect of

the development which was being undertaken by Motheo Construction at the Mpumalanga Province. On the 10th April Mr Leeming received further reports from one,
Mr Wessels, the bank's credit manager in Pretoria who was querying a large credit facility which had apparently been granted by the applicant in respect of a group called Thaba Manzi for approximately R3 million.

This, in Mr Leeming's opinion was very odd to have the respondent's banking division involved in such a large credit facility to a game farm and he accordingly ordered an investigation into various facilities which have been authorised by the applicant. A meeting between Mr Leeming and the applicant was held on the 14th April 1997 and according to Mr Leeming the applicant was once again unable to satisfactorily/..

to satisfactorily answer his questions regarding Motheo and, in his opinion, he became concerned about the
fact that the applicant was being evasive on the issue. As at that time, the investigations had shown that there were other certain matters where the applicant had been involved in granting credit facilities in contravention of the respondent's credit policies and procedures. The investigations had also uncovered other areas of misconduct, for example, the respondent had obtained evidence that applicant had instructed his secretary to type a letter on a Motheo letterhead; to scan or copy Dr Louw's signature on to the letter; the contravening of certain regulations relating to the purchase of certain immovable property which had been repossessed; in light of the aforegoing, he was then suspended on full remuneration on the 15th April 1997 and not as a

result of the alleged failing relationship between him and Mr Leeming.

On the 17th April applicant and Mr Leeming also had a meeting and later in the day certain questions were put to the applicant by Mr Leeming in writing. Applicant responded to the questions on the 28th April 1997. In Leeming's view the responses were not satisfactory and on the 24th April 1997 applicant, whilst under suspension attended the launch of Mpumalanga Housing Project. At

that time/..

that time, the respondent had also discovered further transgressions or the contravention of company regulations relating to the applicant's dealing with the Motheo project. The applicant has denied most, if not all, of these charges in his affidavit. On the 6th May 1997 the applicant was given the notice of a disciplinary hearing.

After receiving the letter with the charges, the applicant proceeded to request further particulars on the charges which had been laid against him; to seek access to external auditors of the bank in order to consult the auditors in preparation for the disciplinary hearing; requested the postponement of the hearing which was scheduled for the 15th May 1997 as he thought the notice which was given to him on the 6th May 1997 was inadequate; and sought access to bank files relevant to his hearing as well as other written instruments.

The respondent refused to furnish the applicant with further particulars, to give him access to auditors and to re-schedule the

hearing. However, on the 15th May 1997 the matter could not proceed and it was re-scheduled for the 20th May 1997. The question of granting of access to the files was partially resolved.

On the/..

On the 8th May 1997 the applicant's attorneys of record wrote to the respondent and placed themselves on record and requested access to the respondent's auditors in order to prepare for the applicant's enquiry; a mutually convenient date of hearing; right to legal representation at the enquiry; an independent chairperson from outside the respondent; a list of witnesses and the sequence in which they will be called; unlimited access to information and files pertaining to the clients referred to in the disciplinary charges; a copy of every document, file, register or record and other written instrument which the bank intends using at or proving before the enquiry; a copy of every document, file, register or record or other written instrument which the respondent does not intend using or proving before the enquiry and that the enquiry be held in public.

On the 12th May 1997 the respondent's attorneys of record replied to the applicant's attorneys of record and in their reply they refused to give the applicant access to their auditors as there was no need for the applicant to speak to auditors in order to prepare for his own disciplinary hearing; on the concern that the charges were vague and embarrassing it was indicated to the applicant's representative that if a request for further particulars

was received/..

was received timeously it would have responded thereto though it was denied that the charges were vague and embarrassing; on the question of adjournments it was indicated to them that reasonable requests for adjournments would be considered although at that stage it was felt it was not necessary to consider an adjournment; on the question of legal representation it was denied; he was advised that he will be given access to relevant information and the applicant was asked to list the relevant documents and files which he needed to have access to and to motivate their relevancy and thereafter access will be given to him in a controlled environment; respondent refused to hold the hearing in public; the respondent refused to appoint an independent chairperson of the enquiry. On the question of the disciplinary procedure applicant was advised that the internal disciplinary procedure will be followed and no attempt will be made to duplicate a court hearing as the guidelines of the new Labour Relations Act envisage an informal process.

On the 14th May 1997, a day prior to the hearing which was scheduled for the 15th May 1997, the applicant's filed a detailed request for further particulars which was approximately eight (8) pages long. Detailed further particulars were requested in respect of each and every

charge set/..

charge set out in the letter dated 6 May 1997. The said application for further particulars stated that they were being requested under South African Labour Law and in terms of Section 25 of the South African

Constitution, in order for the applicant to prepare his case for the proposed disciplinary hearing.

In addition to the detailed Request for Further Particulars on the various charges, the applicant also, in order to prepare for the hearing, required copies of every document, file, register, record or other written instrument which Nedcor Bank intends using at or proving during the enquiry. The applicant also requested a copy of every document, file, register, record or other written instrument in Nedcor's possession or in possession of an official of Nedcor which it does not intend using at or proving before the enquiry, but which pertains to the charges or the enquiry.

On the same day the respondent's attorneys advised the applicant's attorneys that a full set of documents pertaining to the charges were available for collection. The hearing was also adjourned to the 20th May 1997. On the 15th May 1997 the applicant collected a full set of the documents, the total amount of 440 pages which he intended

using at/..

using at the disciplinary enquiry. On the day of the hearing as Mr Gerricke who had been appointed chairman could not be available, a certain Mr D V Nel was appointed. The applicant at the said enquiry objected to the change of the chairman and also to the presence of a human resources, Mr M J Burnell. He then went on to raise a number of objections relating to all the issues which had previously been raised by the applicant in various letters which had been exchanged between the

parties and their legal representatives. He then submitted a copy of a letter from his attorneys together with a request for further particulars dated 14th May 1997. He later objected to the entire enquiry and stated that he will be leaving and not staying in the enquiry. The enquiry then proceeded in his absence and he was found guilty of the charges and was thereafter dismissed.

Further details relating to the facts of the dismissal of the applicant and the events leading to the enquiry will be dealt with insofar as they may become relevant in the course of this judgment.

On the 23rd May 1997, subsequent to his dismissal, the applicant referred his dismissal to the Commission for Conciliation Mediation and Arbitration ("CCMA") for

conciliation./..

conciliation. In terms of his referral form he was seeking urgent reinstatement into his position with the respondent. The matter could not be resolved through conciliation and a certificate to that effect was issued on the 3rd June 1997.

On the 18th June 1997, the applicant applied to the Director : CCMA for the matter to be referred to the Labour Court in terms of section 191(6) of the Act. This application, was then granted. Thereafter, on the 25th July 1997, the applicant lodged with the registrar of this court a statement of claim. On the 12th August 1997, the respondent responded to the said statement of claim. Subsequent to that, the parties

resolved to have a meeting with the Judge President of this honourable court to seek certain directives and thereafter the applicant lodged this application.

At this stage I must mention that, except for repeating in detail in his affidavit what was contained in the statement of case, the applicant did not furnish this court with material facts to support the orders sought in terms of his Notice of Motion, a point which was also raised by the respondent's counsel in his argument. As a result I am of the view that the applicant's application was lacking in a

material respect. It/..

material respect. It contained details about his concerns or complaints about the alleged procedural unfairness which he alleges to have suffered at the hands of the respondent. Inadequate details were contained to support the orders which were being sought. I think more details could have been furnished by the applicant. Rule 7(3)(b) of the rules of this court clearly states that "The application must be supported by affidavit. The affidavit must clearly and concisely set out a statement of material facts, in chronological order, <u>on which the application is based</u>, which statement must be sufficiently particular to enable any person opposing the application to reply to the document" (own emphasis).

This is a point which I will deal with later in this judgment as it becomes of relevance later on.

The nature of the Labour Court hearing

(Section 193 referral is it a review or not?)

The applicant sought an order declaring that section 193 of the Act anticipates a review instead of the re-hearing in respect of both procedural and substantive fairness.

Section 193(2) stipulates that :

Remedies for unfair dismissal

/..

193. **Remedies for unfair dismissal.**

1. If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the court or the arbitrator may –

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c)order the employer to pay compensation to the employee.

2. The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

© it is not reasonably practicable for the employer to reinstate or re-employ the employees; or

(d) the/..

(d) the dismissal is unfair only because the employer did not follow a fair procedure. (My own emphasis).

It was the applicant's view that the Act does not give a clear direction as to what procedure should be followed by the Labour Court or the CCMA in determining disputes but the respondent was of the view that, from reading the various sections of the Act, it is clear that there should be a re-hearing. The applicant was of the view that it should be a review.

The applicant's submission in this regard was that it could never have been the intention of the legislature that there would be a re-hearing which would then mean an employer could have an opportunity to remedy whatever defects which may have happened in the earlier disciplinary enquiry or follow a totally different procedure when it came to a hearing in the Labour Court or CCMA. In the circumstances, the applicant submitted that it should be a review and not a re-hearing.

I do not agree with the applicant's submissions in this regard for reasons which I set out hereinafter. Firstly, this application was a referral to the Labour Court from the CCMA in terms of section 191(6). Section 191(8)

states that/..

states that the matter should be referred to the Labour Court for "adjudication". The Act does not give a definition of "adjudication".

However, in section 191(10), which still deals with the referral of the dispute, it is stated that : "no person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated as the case may be". (My own emphasis).

If the intention of the legislature was to say that the adjudication process anticipated in terms of the Act is the same as a review, as anticipated in the Act, the
legislature would have used the same words and not used different words in this sub-section which relates to the dispute which has been referred to the Labour Court from the CCMA. In my view, it is clear that the words referred to above are used to refer to different processes. If it would be any different, it would make a mockery of section 145 of the Act which anticipates that the court should
review an arbitration award of the CCMA under certain circumstances. As the matter would have been reviewed by the CCMA, then it would mean the Labour Court would be reviewing a review in exercising its powers in terms of section 145 of the Act.

In the/..

In the premises, if it was the intention of the legislature that all the matters referred to the Labour Court are to be reviewed then the word "review" would have been used by the legislature instead of the words "arbitrated or adjudicated" which have been used.

The respondent's counsel submitted, and rightly so, that in terms of the

Act, an arbitration connotes a re-hearing. If one reads section 138 of the Act, it is clear from this section that the arbitrator is expected to re-hear the matter on its merits and the parties may call witnesses and give evidence etc. The leading authority on arbitration in South Africa, Butler & Phipson, "Arbitration in South Africa - Law and Practice", Juta 1993, at page 198 states:

"In English law it is generally accepted that the parties to an arbitration are entitled to a hearing unless they enter an irrevocable agreement to waive that right. It would appear that the position is similar in South Africa. In the absence of a contrary provision in the arbitration agreement, the decision whether or not there should be a hearing must be made by the parties."

By its very nature, the review process is limited and does not hear matters on merits but consideration is given to questions of irregularity or illegality. The review in its ordinary sense anticipates a revision or a

reconsideration of/..

reconsideration of the matter and not a rehearing.

After the parties had failed to resolve the dispute during conciliation, the dispute would have been arbitrated (the full merits of the matter considered as set out above) were it not for the referral to the Labour Court in terms of Section 191(6) of the Act.

Section 191(6) provides that the director is to refer the (same) dispute (which should have been arbitrated in terms of section 138) to the Labour Court if he deems it appropriate. It would then make the whole system to be

unjust and unfair if it was to be said that, once the same dispute is referred to the Labour Court, the parties would lose all the rights which they would have had in the arbitration process of, for example, leading witnesses, cross-examining witnesses, etcetera, and the matter was now to proceed as a review which, in terms of this Act is by application and is decided on affidavits. This being the usual procedure in judicial reviews.

It is my view it is the same dispute which must be re-heard by the Labour Court (using the same process) which would have been resolved by means of arbitration by the CCMA. Accordingly, the same rights which would have been enjoyed

by the/..

by the parties in the arbitration would be enjoyed by the parties at the Labour Court hearing, that is, they will be entitled to a re-hearing and not a review. If one was to use for example, the same argument in dealing with a matter which is being transferred from the Supreme Court to the Magistrate's Court and vice versa, it would be surprising if a civil action was to change its character to a review once it moved from the one forum to the other.

The respondent's counsel further submitted that the interpretation to the Act which the applicant wants this court to adopt is contrary to the intention of the legislature, who wanted to adopt "a simple, quick and non-legalistic approach to adjudication of unfair dismissal". In this

regard, he referred the court to section 14 of the Explanatory memorandum to the Labour Relations Bill and section 1(d)(iv) of the Act (relating to the objects of the Act). The view that the intention in the new Act was to have a quick and inexpensive adjudication process is shared by D Du Toit et al : "The Labour Relations Act of 1995 at page 25. Section 3 of the Act provides that, in the application of the Act, one must give effect to its primary objects, that is, it effectively adopts the purposive approach in the interpretation of this Act. See BAWU v Prestige Hotels t/a Blue Waters 1993 (14) ILJ 963 (LAC)/..

ILJ 963 (LAC) at 972 (G-H) and also D Du Toit : The Labour Relations Act of 1995 at page 44. A similar approach was adopted in interpreting the old Act. See Trident Steel (Pty) Ltd v John N O & Others 1987 (8) ILJ 27 (W) at 32B.

Accordingly, if one is to accept the objects of the Act then the notion of a review before the arbitrator or the Labour Court, as contemplated by the applicant, would be contrary to the very objects of the Act, that is, the simplification and making access to the courts to be affordable to everyone. Applications are usually complex, legalistic and costly in that the parties may need secretarial facilities or even legal services to prepare the necessary application papers.

The respondent submitted that the Industrial Court, in deciding its matters under the unfair labour practice jurisdiction in terms of the Labour Relations Act 26 of 1956 ("the old Act"), the Industrial Court

had, when considering unfair dismissal disputes on the grounds of misconduct, considered both procedural and substantive fairness on the basis of the evidence presented by the parties at the hearing. In so doing, the Industrial Court did not act as a court of review but as a court of first instance. In this regard I was referred to Hoechst (Pty)

Ltd v Chemical/..

Ltd v Chemical Workers Industrial Union and Another 1993 (14) ILJ 1449 (LAC) at 1456 A-C. Having abolished the unfair labour practice remedy, the legal writers, as was
submitted by the respondent's counsel as well, are of the view that the Act has codified many of the principles that were developed by the Industrial Court and the Labour Appeal Court with regard to unfair dismissal. See
D Du Toit : The Labour Relations Act 1995 at page 37.

In the circumstances, in terms of the old Act, the Industrial Court was a court of first instance and was re-hearing matters which had already been heard in the
various domestic tribunals (disciplinary enquiries) of the
various companies. In the circumstances, I cannot see how the legislature could have abandoned that very notion as there is a need for a re-hearing after a disciplinary enquiry in a company which, sometimes are held before chairpersons who are not legally qualified, could be referred to the Labour Court or arbitration to become a review. There can be no doubt in my mind that as that is the first encounter between

the employee, who has been dismissed, with a formal independent body with adjudicators who are qualified to evaluate and decide on the merits and de-merits of his dismissal, it would be appropriate to have a hearing de novo. In a case where an employee has not

had an/..

had an opportunity to even present his case, either through his fault or the fault of the employer, it would be a travesty of justice if he was not to get an opportunity to
state his case in full before whatever tribunal or court which would be hearing his case for the first time after it had left the company structures. In the circumstances, the notion of the arbitration and Labour Court hearing being a review, could lead to an untenable situation in industrial relations. In the case of Dinky Maropane v Gibbs Distillers & Vintners (Pty) Ltd & Another, case number J868/97 Landman A J after considering the provisions of section 194 stated that "the underlying provision for
this principle appears to be that arbitration or court
proceedings are regarded as a substitute for the imperfect disciplinary enquiry and the employee is compensated on this basis". This is once again an affirmation by this court that in terms of this Act a re-hearing is anticipated as was the case in terms of the old Act.

Lastly, the applicant's argument that a re-hearing would be expensive, I believe, is without merit as it would and has been leading to just results if one is to compare same with a review which might not canvass all the issues as already discussed above. That might lead to

dissatisfaction and a need for another intervention. A review, by its very

nature, is/..

nature, is confined to narrower issues than a hearing, In this particular Act, section 145 only directs the Labour Court to review actions of an arbitrator for misconduct which is limited to four points referred to in the said section. The Labour Court cannot go beyond those four points to review an award of a commissioner. Admittedly, the review grounds in terms of Section 158(1)(g) are wider than those in Section 145 but are still limited if compared to a rehearing of the matter.

In light of the aforegoing, I disagree with the applicant's contentions and in this regard accordingly disallow the first two prayers in the applicant's Notice of Motion. Now I turn to deal with the other prayers.

Procedural unfairness being so grossly unfair to be regarded as substantive unfairness

The applicant raised a number of procedural complaints which, in his view, rendered the hearing to be unfair. The said complaints together with the respondent's responses thereto, were set out in the parties' affidavit and were summed up in the respondent's heads of argument as follows:

(1)The entire investigation was a ploy by the chief executive officer to try and take the attention away from his failure to make an adequate

provision for

bad debts/..

bad debts and the confidential documents. In response to this, the respondent said that there were complaints which had been raised against the applicant which were being investigated and which eventually led to him being charged and eventually dismissed from the employment;

(2) The applicant needed access to the company's external auditors and he was refused same. The respondent's response to this was that the auditors were not relevant to the misconduct alleged; furthermore the respondent did not prevent the applicant from

contacting the auditors himself. The external auditors have independently confirmed that applicant's allegations regarding inadequate provision for bad debt by respondent are incorrect;

(3)The applicant complained that the disciplinary hearings were scheduled unilaterally by the respondent with inadequate notice. The Respondent admitted that the hearings were unilaterally scheduled, but denied that it is obliged to schedule the enquiry in conjunction with the applicant. Furthermore, the applicant was initially given notice of a hearing from the 6th to the 19th May with the

hearing date being adjourned to the 20th May 1997, in which circumstances the applicant received two weeks' notice, which/..

notice, which is more than adequate;

(4)Respondent did not respond to applicant's request for further particulars. The applicant responded by stating that the charges were sufficiently

particularised and understandable. Furthermore, there is no provision

in the guidelines to the Act or in Nedcor's disciplinary procedure for a request for further particulars. The particulars requested dealt with evidence at a disciplinary hearing.

Furthermore, there were long and detailed requests to the respondent as an attempt by the applicant to delay or avoid dealing with the merits of the issues. Furthermore, this was served very late, a day prior to the hearing and thus applicant feels it was an attempt to try and obtain a postponement of the hearing.

(5)Applicant requested access to all the files and documents in respondent's premises. He alleges that he was only given belated access to only a few documents and alleges that access to clients' file was vital to his case and was denied. The respondent confirmed that the applicant was provided

on the 15th May 1997 with a complete dossier, consisting of 440 pages of all of the documents which the respondent intended using at the enquiry. Applicant's request for documents and files was

couched in/..

couched in such a wide and unsubstantiated manner that the impression was again created of someone seeking procedural or technical stumbling blocks to

avoid the matter being dealt with expeditiously. It was also made clear to the applicant by the chairman of the enquiry that every effort will be made to provide him with copies which he might request, as long as those have been specifically identified and then requested during the enquiry. This was rejected.

(6)Applicant alleges that the Nedcor disciplinary procedures/code was made applicable to the hearing and that several unspecified rights which he

should
have enjoyed were ignored. It is further alleged that further particulars should have been furnished
in terms of the said code. The respondent's submission is that the code does not apply at General Management level. With regard to this particular matter, the code was merely referred to as a guideline, where appropriate, to ensure fairness.
The code does not make provision for a request for further particulars. Furthermore, the code envisages an investigation and not a formal enquiry. Inherent in the notion of an investigation is that facts will be elicited during the investigation and not only before.

(7) Applicant/..

(7)Applicant alleges that the charges were not set out with sufficient particularity to inform him of what is alleged to have been done. It is alleged that he was unable to cross-examine witnesses, consult his own witnesses and state his case. The respondent alleges that the charges were clearly indicated to applicant what the applicant had done. Nothing precluded the applicant from consulting with his own witnesses.

(8)The applicant alleges that his request for a postponement to seek urgent relief during the enquiry was refused. As a result, he excused himself as he
needed to deal with the original issues which were
then raised which were of concern to him. In this regard, the respondent alleges that the applicant absented himself from the hearing. In the circumstances, he could not be held to complain about the enquiry which was held in his absence and, furthermore, his credibility should be suspect.

(9)Applicant complains that he was not given an opportunity to obtain facts or to provide facts in mitigation. The respondent in this regard submitted that if applicant had not absented himself he could have submitted facts in mitigation. The misconduct alleged and proved was sufficiently serious to merit dismissal.

(10) Applicant/..

(10)Applicant alleges that respondent refused to allow an appeal. The respondent's reasons for refusing an appeal are that the applicant elected not to put his case at the disciplinary hearing. The respondent was not prepared to re-hear the matter or to continue traversing the procedural issues which had been raised by the applicant in terms of his letter dated 22nd May 1997.

(11)Furthermore, applicant had made it quite clear that he did not believe that any member of senior management was able to deal with this matter on an impartial basis. The respondent is of the view that no appeal is envisaged in terms of the Act. And at that time, the applicant had made disclosures to the media which were in flagrant breach of his confidentiality and the secrecy undertaken, thus making a restoration of the employment relationship utterly impossible to the extent that the employment relationship had already been irretrievably broken down.

(12) Applicant alleges that he requested minutes of the disciplinary enquiry or the chairman's notes. The respondent insisted that no minutes of the enquiry were kept. Applicant was advised that the chairman would only keep his own personal notes of the enquiry. The applicant was invited to keep his own

notes at/..

notes at the enquiry but chose to walk away.

The notes of the enquiry which were compiled by the chairman were annexed to the respondent's answering affidavit. With regard to applicant's failure to attend the disciplinary enquiry the respondent representative referred to the cases of Hoechst (Pty) Limited v Chemical Workers Union and Another 1993 (14) ILJ 1449 (LAC) at 1457 and Dinky Moropane v Gilbeys Distillers & Vintners (Pty) Ltd and Another, case number J868/97 (unreported).

I do not intend dealing with the merits or demerits of the various complaints with regard to the procedure which are
set out above as I do believe that, as this is an interlocutory application, they shall be the subject matter of a later hearing which would look into the fairness or unfairness of the dismissal, that is either procedurally or substantively. There is also a clear dispute of fact regarding the allegations.

I have some difficulty with the merits of this prayer as, to a certain extent, it seeks the court to deal with an issue which has not as yet been decided. As to whether there was procedural unfairness, a hearing will have to be held and thereafter one could be in a position to decide whether there was procedural unfairness and, if so, whether that procedural/..

that procedural unfairness was of a serious nature. Thereafter one would be in a position to decide whether it was so serious or

fundamental that it could be regarded as substantive unfairness.

It was common cause amongst the parties that there are instances when a court could order reinstatement. If one reads section 193(1) together with section 194, there are three different remedies which a court or arbitrator may order for an unfair dismissal, namely, re-employment, reinstatement and compensation.

On a proper reading of section 193(2)(d), for you to come to the conclusion that a decision is only unfair because the employer did not follow fair procedure, you will have to also consider substantive fairness. It can never be that you can only come to that conclusion having only looked at procedural fairness. The same applies with the reading of section 194(1) which deals with the compensation in the case of the dismissal being only procedurally unfair. By saying that the decision was only procedurally unfair, it means you have considered evidence on substantive issues as well. The same would apply with regard to Section 193(2)(b), the leading of evidence regarding the circumstances surrounding the dismissal, as

expected in/..

expected in the sub-section, would call for or lead to the leading of evidence on the merits of the case. It is clear from a reading of this section that you do need to hear both substantive and procedural fairness for you to come to that conclusion. In the circumstances, I disagree with the applicant's interpretation of these two sections.

The question of whether the dismissal was substantively or procedurally unfair can only be decided once the court has heard all the evidence. In most cases, there is an overlapping of evidence in this regard.

There was a clear dispute of fact with regard to most, if not all, of the alleged procedural irregularities referred to above. For me to even venture into saying whether the alleged procedural irregularities were so gross or substantial to be regarded as substantively unfair would be irregular as it would not have been substantiated by any evidence which had been tested. At this stage I only have allegations and counter-allegations between the parties.

I am of the opinion that the applicant would only be in a position to know whether the procedural unfairness was so gross that it amounted to substantive unfairness once the court has had an opportunity to hear all the evidence in

respect of/..

respect of both procedure and merits or at least, after the applicant has dealt with the substantive allegations raised by the respondent in his affidavit. At the present moment, the applicant's case is in a position where even if one were to try to resolve this matter, one would have to rely on the respondent's version on the merits of the dismissal. See Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 AD at 634E to 635C. At 634E Corbett JA said:

"In such case the general rule was stated by van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmers Winery Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E-G to be:...

"where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... where it is clear that facts, though not formally admitted, cannot be denied, hey must be regarded as admitted"

From the papers in this case, it appears that the applicant has not dealt with all the allegations regarding the alleged transgressions by him of the company procedures relating to credit facilities and the alleged acts of misconduct (substantive issues) but only dealt with

procedural issues./..

procedural issues.

As already stated, the only manner in which I can correctly decide on the fairness or unfairness of the alleged irregularities would be for me to hear oral evidence. Any attempt to decide on the issues without any reference to the facts in the current I would find to be highly irregular or inappropriate.

The Appellate Division in the case of Ross & Another v Silberman & Other 1963 (2) SA 296 (W) at 297 state when dealing with a declaratory order stated that :

"In the present case the court is asked to give an opinion on a hypothetical question, in effect, to advise the first petitioner whether or not he will be prejudiced should he sell his shares in second petitioner. It is true that, should an answer be given in his favour, he may be able to get a better price for his shares, but the facts in the present case seem to me to be analogous to those in Becker v Commissioner for Inland Revenue 1945 WLD 193. There the court was asked to determine whether the owner of property would be

liable to pay the fixed property profits tax should he sell a certain property. Blackwell J at page 198 adopted the reasoning of Hathorn, JP, quoted at page 31 of the report of the Durban City Council case, supra, where the latter said :

In the present case, the alleged right of the City Council is contingent upon the passing of the Ordinance. This means that if and when the contingency happens then the right will be created. It follows/..

It follows that the right does not exist at the present time and that therefore the City Council has no right which can be enquired into and determined."

Similarly, in the current case, the right upon which the order sought is based does not yet exist. By that, I mean
the finding as to whether there was procedural unfairness in the applicant's dismissal, let alone whether it amounts to substantive unfairness, has not as yet been made, as a finding and thus it is a hypothetical question which cannot be answered in terms of a declaratory order in my view.

The law is clear that the court would refuse to exercise its discretion to grant a declaratory order where it is called upon to answer hypothetical questions. Furthermore, it has been held that a plaintiff is not entitled to claim a declaration of rights merely because those rights have been disputed by the defendant, he must prove some infringement of them. See Colonial Government v Stephan (17SC) 39.

The common law position in South African law in respect of declaratory orders was set out by the Appellate Division as per Innes CJ in Geldenhuys & Neethling v Buethin 1918 AD 426 at 441, who stated in the course of his judgment that :

"Courts of/..

"Courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions, however important.
The court went on to state that all the facts upon which the right depends should be before the court in such applications."

This common law position has been followed in a number of decisions even after the enactment of section 102 of Act 46 of 1935 (now s19(1)(a)(iii) of Supreme Court Act 59 of 1959) which codified the common position with some amendments. See Ex parte Ginsberg 1936 TPD 155, Durban City Council v Association of Building Societies 1942 AD 27, Maitland Cattle Dealers (Pty) Limited v Lyons 1943 WLD 1 and South African Breweries Ltd v Registrar of Deeds 1943 CPD 433.

In ex parte Ginsberg (above), Greenberg J, laid the rule that the declaratory order must have a binding effect on the parties and there must be an existing right at the time of instituting the proceedings. At page 157 after quoting the above-mentioned passage of Innes CJ, he clarified the object of section 102 of Act No. 46 of 1935 and said that it: "was not to alter the fundamental characteristics of the court, that is the settlement between the parties of a dispute by its decisions; the words of this section do not point clearly to any intention other than to remove the limitation imposed by the Common Law on declaratory actions

and to/..

and to enable the court to determine questions not only as to existing rights but also to future or contingent rights, whether consequential
relief was presently claimed or not".

In the circumstances I will refer to cases decided in terms of s102 of Act 46 of 1935 in so far as they may be relevant or compatible with the common law position.

In Ross & Another v Silberman & Others 1963 (2) 296 at 297, where De Wet JP when dealing with an application in terms of section 19(1)(a)(iii) of the Supreme Court Act No. 59 of 1959 (this provision was in identical terms with section 102 of Act 46 of 1935 which it replaced) stated at 297 E to G :

"In the present case the Court is asked to give an opinion on a hypothetical question, in effect to advise the first petitioner whether or not he will be prejudiced should he sell his shares in second petitioner. It is true that should an answer be given in his favour he may be able to get a better price for his shares but the facts in the present case seem to me to be analogous to those in Becker v Commissioner for Inland Revenue 1945 WLD 193. There the court was asked to determine whether the owner of property would be liable to pay the fixed property profits tax should he sell a certain property. Blackwell J at p.198 adopted the reasoning of Hathorn J P quoted at p.31 of the report of the Durban City Council case, supra, where the latter said:

"In the present case the alleged right of the City Council is contingent upon the passing of the Ordinance. This means that if and when the contingency happens then the right will be created. It follows that the right does not exist at the present time and

therefore the/..

therefore the City Council has no right which can be enquired into and determined."

In Mabukane v Port Elizabeth Divisional Council 1957 (4) SA 293, a case where the applicant sought a declaratory order after criminal proceedings had been instituted against him, At 297, De Villiers JP held at 297 A:

"Unless the facts are not in dispute or are agreed upon or are irrelevant to the

determination of the declaratory order, such an order would not be competent on affidavit as it cannot have the effect of res judicata between the parties. Ex parte Ginsberg 1936 TPD 155. Nor, in my view, is a case of the present nature a proper one for a declaratory order. In this regard reference may be made to the reference of Schreiner JA, in the case of Attorney General of Natal v Johnstone & Company Limited 1946 AD 256 at page 261".

Schreiner JA in Attorney General of Natal v Johnstone & Company Ltd 1946 AD 256 at 261, sounded a note of warning against granting an application for a declaratory order in a case where a criminal case against the applicant has already been commenced even if it has only reached the indictment stage. (In this matter there was no dispute of fact. The court was only being asked to decide what the law was on the undisputed facts).

Similarly, in/..

Similarly, in this case, disciplinary proceedings have commenced against the applicant. In the circumstances, I would agree with the views expressed by Schreiner JA where he stated that it might be inappropriate to deal with a declaratory order under the circumstances even though this is a labour matter and not a criminal matter. Similarly in this case, no advantage will be gained by proceeding
with a declaratory order instead of proceeding with the hearing relating to the applicant's dismissal. If the applicant was unfairly dismissed, due to a defective procedure, then the Labour Court will accordingly make that finding and reinstate or re-employ or pay him compensation in terms of the Act. A declaratory order should not be granted where it would interfere with a disciplinary hearing in the event of an employee having already been charged or dismissed unless there are special or

compelling reasons. It would be a different case if no hearing had commenced and applicant was seeking a declaratory order to try and clarify some of the issues relating to the Labour Relations Act which pertained to any of the rights which had vested in him, for example, see Glencairn Lime Co (Pty) Ltd v Minister of Labour and Minister of Justice 1948 (1) SA 828(T). Our courts have also held that it is inappropriate to seek a declaratory order to try and decide as to which cause of action one should take in preparation

for a/..

for a hearing which is to be held. See Bresgi v Lazersohn 1939 AD 445 at 452.

The current case can never be a case where one can easily say that procedural unfairness was so gross or fundamental and thus it can be regarded as being substantially unfair to justify the reinstatement of the applicant. For one to reach that decision, as I have already stated, one should also consider the reason for the dismissal. That is, the substantive fairness thereof or the merits thereof. For one to come to this conclusion, one will have to evaluate the extent and nature of the procedural transgression by the employer as against the nature and seriousness of the substantive transgression by an employee.

On the other hand, it might even be, for example, a case where even if there had been the procedural irregularity, the applicant would inevitably have been dismissed due to the seriousness of the

offence. The only price, under those circumstances, the employer may have to pay would be the compensation as anticipated in section 194(1) of the Act, if there was any procedural transgression.

In the circumstances, it will be inopportune for the court to exercise its discretion and to grant this declaratory

order having/..

order having not considered all the merits of this case and in light of the reasons which have already been stated above There is a problem of a dispute of fact which can only be resolved in a trial court and, thus, the finding as to whether there was procedural unfairness or not can only be made after the aforesaid hearing. If that finding has not been made, then the order sought herein cannot be granted as the applicant has not proved the existence or the infringement of any such right which is a requirement in terms of our common law for declaratory orders.

Directive for separating the procedural and substantive fairness hearings

The last order which the applicant sought was for the separation of the procedural and substantive fairness hearings of his trial. At paragraph 31 to 33 of his founding affidavit, the applicant has stated that :

"31. It would therefore be prudent and protocol for the procedural unfairness and the degree thereof to be considered first. If there is a finding that the procedure adopted was unfair and the dismissal therefore unfair, I believe that argument will be placed before the

court stating that procedural unfairness in this matter was so fundamental and
that, in the absence of any sensible input from my
side, what/..
side, what happened at the hearing cannot be described as substantively fair or as reaching a substantively fair outcome.

32. I reiterate that I maintain that I am innocent;

33. I therefore respectfully submit that procedure adopted should be along the following lines :

33.1 There should be a directive directing that the procedural fairness or otherwise of the hearing will be considered first;

33.2 That such procedure is by way of a review or a control procedure in respect of what happened at the hearing and not a fresh hearing; to argue otherwise, I am informed, would be totally unacceptable since it will mean that the employer can before this court now follow correct procedure, now make available further particulars and correct the procedural errors committed at the hearing; this can never be the legal position since the only question at this stage is whether the dismissal was procedurally fair or not."

In paragraph 67 of the applicant's statement of case, the applicant stated that he "will argue that an unfair dismissal and a gross unfair labour practice resulted and that the employer did not have a fair reason to dismiss him nor was such a decision reached after a fair procedure.

The applicant/..

The applicant would also argue that because his basic procedural rights were ignored, it was not possible for the respondent to come to a substantively fair decision either, the applicant having inter alia been unable to prepare properly, to plead or to take part sensibly and properly in the disciplinary enquiry and to state his case."

As I have already stated above, in his letter of referral to the CCMA, that is LRA form 7.11, the applicant sought urgent reinstatement. It is apparent from the application papers that the applicant seeks to obtain reinstatement when he had not addressed the merits of the aforesaid dismissal. The respondent's counsel strongly argued that the applicant has raised a whole lot of procedural issues with the hope that he may get final relief without having to address the merits of this matter.

I do agree with the respondent's counsel in this regard. It is clear that the applicant seeks reinstatement not having dealt with the merits of the case. So I come to this conclusion because the only reference, besides another denial in his Replying Affidavit, which has been made by the applicant to the merits of this case is made only in paragraph 32 of the applicant's founding affidavit which is quoted above. Even then, he only mentions that he is

innocent without/..

innocent without stating why he believes that he is innocent and why the

court should make that finding.

Section 193(2) of the Act seeks to qualify the cases or circumstances under which a dismissed employee may be reinstated. The said sub-section clearly sets out the limitations with regard to the reinstatement, for example in Section 193(2)(d). Clearly, as it has been discussed above, if one needs to make a clear and unequivocal decision as to what to do, there will be a need to consider both procedural and substantive fairness. It might not only be unfair to the applicant or the employer to only deal with procedural unfairness and leave out substantive fairness (where a party seeks "urgent reinstatement" as in this case) but it would also border on being a travesty of justice on the part of the court or the arbitrator who might be hearing the matter.

Section 188(1) provides :

(1) a dismissal that is not automatically unfair, is unfair if an employer fails to prove

(a) that the reason for dismissal is a fair reason -

(i) related to employee's conduct or capacity; or

(ii) based upon the employer's operational requirements; and

(b) that the/..

(b) that the dismissal was effected in accordance with fair procedure (My own emphasis).

Respondent's counsel also argued that section 188(1) of the Act requires the employer to prove both the reason (substantive fairness) and fair

procedure for the dismissal to be regarded as fair. In light of this section, substantive and procedural fairness should be proved to decide whether a dismissal was fair or not. In my view, if the legislature had intended that one could prove either procedural fairness or substantive fairness, he would have used words to that effect. In the circumstances, the word "and" at the end of section 188(1)(a)(ii) would in addition have been substituted with the word "or".

The provisions of section 188(1) do not mean that the court, for the procedural convenience in matters before it, cannot decide to call evidence on substantive fairness first and later call evidence on procedural fairness or vice versa, that is, try to separate the issues. This view is also shared by the respondent. However, under those circumstances, no judgment should be given by any court in between. The giving of judgment in between is what the applicant is seeking in this application. In my view, only a final judgment after all the issues have been considered and canvassed can be given for justice to not

only be/..

only be done but to be seen to be done.

Our courts do consider the separation of issues where there are good grounds for doing so. The current Labour Court rules do not have any provision for the separation of trials or issues. In the circumstances, I have taken guidance from the cases, I was referred to by Mr Pretorius which deal with rule 33(4) of the High Court Rules.

The general rule which for the separation of the issues or stay of proceedings which has been reiterated in a number of High Court judgments is that it is done if it is favoured by the balance of convenience and also if no party would be prejudiced thereby. See Minister of Agriculture v Tongaat Group Limited 1976 (2) 357 (D) at 362 G–H, where the court held :

"It goes without saying that it is not the convenience of any one only of the parties, or of the court only, that is the criterion. The convenience of all concerned must be taken into consideration

and, as De Wet, J, pointed out in Vermeulen v Phoenix Assurance Co Ltd 1967 (2) SA 694 (O) at 697, there should exist substantial grounds to justify the exercise of power.

Ordinarily, it is desirable in the interests of expedition and finality of litigation to have one hearing only at which all the issues are canvassed so that the court, after conclusion of the trial, might dispose of the whole of the case. Rule 33(4) was no

doubt conceived/..

doubt conceived in the realisation that in some instances the interests of the parties and the ends of justice would be better served by disposing of a particular issue (or issues) before considering other issues which, depending on the result of the issues singled out, might fall away or become confined to substantially narrower limits. Similar considerations also underlie the procedure relating to exceptions. To an extent the procedure envisaged by Rule 33(4) and the procedure of exceptions may overlap. But I do not think it was ever contemplated that questions of law arising from the pleadings and capable of being resolved on exception should be the subject of an application under Rule 33(4)."

The respondent submitted that it would not be convenient and it would be prejudiced by the splitting of the procedural and substantive issues because the applicant would seek final relief only on partial consideration of the issues which led to his dismissal. Furthermore, there would be prejudice caused to the respondent in terms of costs, as

there would be a duplication of actions if the matter were to proceed to a hearing on substantive fairness at a later stage. Certain witnesses will definitely have to be called twice on the same facts as there seems to be an overlap in the facts in this matter. Furthermore, the exercise of splitting the issues would be expensive and may lead to evidentiary problems which the courts have held need to be avoided at all costs and the protecting of the

trial./..

trial. In Tudorich-Ghema v Tudorich-Ghema 1997 (2) SA 246 at 251 G to J, the judge had this to say about the calling of witnesses twice :

"An analysis of pleadings suffices to illustrate that much evidence will overlap. Both parties will be cross-examined at both hearings and findings of fact will be made in respect of their evidence. It is probable that a credibility finding will also be made. The judge deciding the custody dispute might not hear the other issues. This would lead to a situation where different or even conflicting findings on fact and credibility are made in respect of the same witness testifying on wholly, or partly, the same facts. This, is in my view, a weighty consideration against ordering a separation of issues."

In a case where the issues are separated between liability and quantum, the decision on one issue might lead to the matter falling away. However, in this matter, even if the issues were to be separated, there would still be a need to consider the issue of substantive fairness. In the circumstances, it can never be said to be convenient or appropriate to any of the parties and also it can never be said to be the most cost-effective way of dealing with this hearing.

The concern, with regard to the lack of necessary averments in the applicant's affidavit to support the order sought

was raised/..

was raised at the beginning of this judgment. It is imperative that any applicant in his application sets out substantial grounds to justify the splitting of actions with regard to any order which he might be seeking. The applicant bears the onus in trying to convince the court to grant such an order. In Sharp v Pretoria West Municipality 1979 (3) SA 510 at 512 C–D van den Heeven J said:

"In my view a plaintiff, as dominus litus, will rarely be able to persuade the Court, contrary to the wishes of the defendant, to order a piecemeal hearing, for the very reason that the weaker his case the better his prospects of obtaining a separation of issues (Netherlands Insurance Co of SA Ltd v Simrie 1974 (4) SA 287 (C) at 288H; and it hardly lies in a plaintiff's mouth to swear to lack of faith in the cause he persists in pursuing against defendant".

In the circumstances, I have to agree that, in this case, there should be no separation of the substantive and procedural issues as it will definitely cause prejudice to one, if not all the parties, including the over-burdening
of the court with duplication and unnecessary litigation. Furthermore, I could not find any convincing reasons for granting of this order.

Costs

The respondent has sought an order for costs on attorney

and own/..

and own client scale as they felt that this application was frivolous. The applicant has submitted that an order for costs, that each party pays its own costs, would be appropriate, as this application was instituted after they had obtained a directive from the Judge President

of this Court, that on the issues where there was disagreement, it might be appropriate to proceed by way of a declaratory order. In Flamingo General Centre v Rossburgh Food Market 1978 (1) SA 586 D, the court held that one should be reluctant to order a special costs order, especially for an interlocutory application, as it might send a wrong message about the court's view or attitude to the litigation before it.

The Labour Relations Act is a fairly new Act and thus one does expect parties to seek the guidance of the court on a number of provisions. This would encourage the development and the interpretation of the Act. Furthermore, it would not be appropriate to give a costs order which would discourage individuals from seeking the assistance of the court in, amongst others, protecting
their rights if they believe that they have been violated, even if that approach to the court might be misguided. See Zipp v Trac X Spares (Pty) Ltd & Others 1989 (10) ILJ 1137 at 1142-43. Section 162 of the Act provides that the

Labour Court/..

Labour Court may make an order for payment of costs according to the requirements of the law and fairness. Fairness and the law should be balanced in the award of costs. In this regard, see judgment of Zondo J in
Call Guard Security Services (Pty) Ltd v Transport & General Workers Union & Others (1997) 18 ILJ 380 and Malanbah v South African Broadcasting Corporation 1977 (18) ILJ 544 at 550. In the circumstances, I do believe that

fairness does call for an order which would not be a special order of costs.

For these reasons I accordingly dismiss the application with costs on a party and party scale.

HONOURABLE ACTING JUDGE JALI

FOR THE APPLICANT : ADV ETIENNE DU TOIT SC

instructed by Mendelow-Jacobs

FOR THE RESPONDENT : ADV P J PRETORIUS SC

instructed by Shepstone & Wylie, Durban

and Edward Nathan & Friedland Inc, Johannesburg

DATE OF HEARING : 7 NOVEMBER 1997

DATE OF JUDGMENT : 28 NOVEMBER 1997