IN THE LABOUR COURT OF SOUTH AFRICA

Case Number: JR5/97

Before A A Landman J

In the matter between:

NATIONAL ENTITLED WORKERS UNION **Applicant**

and

DG JOHN AND GROUND WATER CIVILS CC **Respondents**

On behalf of the Applicant:

MR D MALULEKE of **NEWU**

On behalf of the Respondent:

No appearance

Date and Place of Proceedings:

29 October 1997 Johannesburg:

JUDGMENT

The papers show that a dispute between National Entitlement Workers Union, the applicant, and Ground Water Civils CC, the second respondent, was referred to the CCMA for arbitration. This dispute was arbitrated by Dr D G John who has been cited as the first respondent. Dr John issued an award on the 18th of March 1997, a copy of that award is attached to the papers. The relevant part of the award reads as follows:

"My award is that the dismissal of Jafta was unfair both substantively and procedurally. He is to be re-employed in his position as security guard or site watchman on the basis of working not more than 60 hours per week. His employment will continue to be "temporary" in the sense that it will end as soon as work on the current site is completed. He is to be re-employed with retrospective effect from 6 February 1997. The amount payable to him would then be an amount equivalent to R4.25 per hour for 12 hours per day for 30 days. This equals R1 530.00. This amount must be paid to him within seven days of his re-employment."

Dr John has indicated that he abides the decision of this Court. The second respondent has not entered an appearance and has not filed any affidavit and consequently this matter was set down for default judgment. Mr Maluleke appeared on behalf of the applicant and handed up a draft order which he sought to be made an order of this Court. He seeks to review this arbitration award on the basis of section 145 of the Labour Relations Act. This section reads as follows:
"(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the date that the award was served on the applicant unless the alleged defect involves corruption; or (b) if the alleged defect

involves corruption within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in sub-section 1 means

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

It should be noted that these grounds of review are similar to those which obtain to an arbitration conducted in terms of the Arbitration Act 45 of 1965. It is important to note that in this case Mr Maluleke does not rely on the wider grounds which are referred to section 158(1)(g) of the Act, nor has he attempted to show me that in accordance with the spirit and purpose of the constitution the grounds should be extended. Consequently I decide this matter solely on the basis of section 145.

Butler & Finson **Arbitration in South Africa, Law & Practice**, Juta 1993, deal with the grounds for setting aside an arbitration award and they say at page 293:

"Our courts have consistently taken the view that a bona fide mistake by the arbitrator in reaching his conclusion on the merits of the dispute, whether on the law or the facts, and irrespective of whether the mistake appears from the award or not, is not a basis for setting aside an award as misconduct or some other ground. In the leading case of **Dickinson and Brown v Fischer's Executors** Solomon J A stated:

"Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a bona fide mistake either of law or fact made by an arbitrator can be characterised as misconduct any more than a judge can be said to have mis-conducted himself if he has given an erroneous decision on a point of law ... But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision I think it would be impossible to hold that he had been guilty of misconduct merely because

he made a bona fide mistake either of law or fact."

It is now necessary to turn to the actual grounds upon which the applicant relies. These grounds are to be found on page 4 of the papers, paragraph 8.2, which reads:
"There is a defect in the arbitration proceedings under the auspices of the commission because:

(a) the commissioner, ie first respondent:
(i) committed the gross irregularity in the conduct of the arbitration proceedings; and/or
(ii) exceeded the commissioner's powers."

This is further elaborated on on page 6 in paragraph 14 where it is said:
"The first respondent has committed gross irregularities and exceeded commissioner's powers in:

(a) Having stated at page 6 of his award that "it became common cause that the basis of Jafta's employment was unlawful" on the ground that "work for 12 hours per day seven days per week was greatly in excess of the 60 hours per week permitted";

(b) Having held at page 10 of his award that "reinstatement cannot be granted because to do so would put Jafta back in an unlawful position";

(c) Having held at page 10 of his award that I was under an obligation to mitigate my loss by accepting second respondent's labourer's job offer after having sought alternative employment without success;

(d) Having awarded a re-employment (on the ground that reinstatement cannot be granted because to do so would put Jafta in an unlawful position);

(e) Having made the re-employment retrospective to 6 February 1997 (ie for a period which would give me the approximate equivalent of wages for that time) on the ground that having sought

alternative employment without success I refused to accept the second respondent's alternative employment offer on 27 January 1997; and

(f) Having awarded me less and unreasonable compensation of R1 530.00 on the same grounds stated in ad paragraph (e) herein above."

The applicant continues in paragraphs 15-19:
"The first respondent had no power to hold that my employment was unlawful on the grounds stated in ad paragraph (1)(4)(a) herein above:

(a) It is the power and duty of the designated inspectors of the Department of Labour to hold that my employment may be unlawful;

(b) The Act does not empower the first respondent to hold that my employment was unlawful;

(c) Work for 12 hours per day seven days per week greatly in excess of the permitted 60 hours per week does not (and cannot) make my lawful employment unlawful. My job contract with the second respondent was lawful. To require or permit an employee to work more than the statutory maximum working hours does not (and cannot) make a valid agreement of employment unlawful to work or to insist on working seven days per week, ie on working more than the statutory maximum working days does not (and cannot) make a valid agreement of employment unlawful;

(d) My employment was not unlawful. A security guard position was a lawful position;

(e) Accordingly reinstatement can be granted because to do so - (i)

will put me back into my lawful position; (ii) will be in proper compliance with section 193(1)(a) read with section 193(2)(d) of the Act; and (iii) will be a fair determination

contemplated in section 138(i) of the Act.

(f) In his own findings the first respondent held that my dismissal is procedurally and substantively unfair. The appropriate arbitration award for an unfair dismissal which is both procedurally and substantively unfair is reinstatement with full retrospective effect to date of such unfair dismissal. I was only punished or deprived of a reinstatement on the ground that I worked more than the statutory maximum working hours and days. The Act does not empower the first respondent to refuse to make a reinstatement award on the aforesaid ground. The second respondent who permitted me to work in the aforesaid hours and days was never punished for such unlawful permission.

16:
"The first respondent had no power (in terms of this Act) to hold that reinstatement could not have been granted because to do so would put me back in an unlawful position. My position was not even unlawful at all.

17:
"After having sought alternative employment without success it was not expected of me to take steps which would infringe upon my reputation and/or dignity or

which would be unreasonable in my particular circumstances. The test is that of the reasonable man.

(a) "An employee who has been dismissed need therefore not accept an offer of new employment from the employer who has committed breach of contract.

C F Jabour (Pty) Ltd vs Miller 1984 SA 280(W) at 284)."

(i) The second respondent committed breach of contract by summarily dismissing me before and without having given me the due notice of termination of employment and by offering me an un-agreed and unreasonable labourer's job.

(ii) I did not act unreasonably or unlawfully in refusing to accept this non-dignified labourer's job. I am not a labourer, I am a security guard.

My friends, relatives and fellow-workers knew and saw me working as a security guard. I cannot be held disentitled to recover all my wages caused by second respondent's unlawful unfair dismissal."

18:
"Although section 194(1) of the Act provides that if a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration calculated at the employee's rate of remuneration on the date of dismissal. The first respondent exceeded this commissioner's powers and committed a gross irregularity by awarding me less compensation."

19:
"Although section 194(2) of the Act provided that "the compensation awarded to an employee whose dismissal is found to be unfair because the

employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct ... must be just and equitable in all circumstances, but not less than the amount specified in sub-section 1", the first respondent committed gross irregularity and exceeded his powers by granting me less than the amount specified in sub-section 1 of section 194 of the Act."

I will first deal with the question of re-employment. Section 193 of the Act deals with the remedies for unfair dismissal and provides:

"(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair the Court will arbitrate and 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 any other reasonably suitable work on any terms and conditions from any date not earlier than the date of dismissal; or

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

It was therefore within the powers of the commissioner to order either reinstatement or re-employment or compensation. In this case for reasons which are set out in the award, namely that the commissioner felt that the employee was working excess overtime, the commissioner decided to order re-employment and this to be on terms which he set out in the award; terms which would not infringe the Basic Conditions of Employment Act of 1983. Although I think the commissioner would have been entitled to order reinstatement, subject to the caveat that the working hours not be exceeded, he did not do so, but that is not a gross irregularity. Consequently I find that the order for re-employment was within the powers of the commissioner and that he did not act either reasonably, nor did he exceed his powers in making the award.

I next turn to the question of the retrospective effect of the re-employment order. In this regard the commissioner decided that although initially the applicant was not obliged to accept the offer of a lesser job as a labourer, that later on it became imperative for him to have accepted that job. This is motivated at page 10 of the award as follows:

"But he was under an obligation to mitigate his loss as far as possible. He testified that he had looked for other jobs without success, but there was another job readily available to him which he should have accepted. He had a further opportunity to accept that job on 27 January but again declined it. He was not obliged to accept the unilateral change in his conditions of employment and thus to accept the alternative job on 11 December. Having sought alternative employment without success, however, a time came when the alternative employment offered to him by the company should have been accepted. In my view that time came after about a month. It would be fair to make the re-employment retrospective for a period which would give him the approximate equivalent of wages for that time."

I must say that in my opinion, had I decided this case, I would have not regarded the offer of a labourer's job on the 27th of January as being an offer which the applicant should have accepted. I say so because, although there is an obligation to mitigate his loss, there is obviously a limit to what can be expected of an employee to mitigate his loss. Although I can understand a contrary argument and although it may be a borderline case I would have found that the re-employment should have been made retrospective to 11 December 1996. However, this is not an appeal and I am not here sitting as a court of appeal in regard to the award made by the commissioner. I am restricted, as I have set out above, to determine whether or not there was a defect in the arbitration

award as specified in section 145(2) of the Act. I cannot say that there was any misconduct for quite clearly the commissioner carefully considered the question of mitigation and what was called for. I cannot say that by doing this he committed any misconduct or that he acted in a manner which was grossly irregular in the conduct of the proceedings.

I then turn to the question of procedural fairness. Here it was submitted that one of the grounds for review was that the commissioner had exceeded his powers. However, it is clear that section 194(1) of the Act deals with limits on compensation and is only applicable if a dismissal is unfair only because the employer did not follow a fair procedure. If that was the sole basis for finding that the dismissal was unfair it would then have been competent to award compensation and the section sets out how compensation should be awarded. However, this is a case where the dismissal was unfair both procedurally and substantively and it was within the powers of the commissioner to cure the procedural defect by ordering re-employment which is what he did. In the circumstances I come to the conclusion that there is no ground in terms of section 145 for interfering with the award made by the commissioner and consequently the application is dismissed.

SIGNED AND DATED AT JOHANNESBURG ON THIS 4TH DAY OF NOVEMBER 1997

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JUDGE A A LANDMAN

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