IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J449/98

In the matter between:

SMUTS, P **APPLICANT**

and

ADAIR, B. A. **FIRST RESPONDENT**

WELTEPARK PHARMACY **SECOND RESPONDENT**

JUDGEMENT

SEADY A J

Introduction

[1] This is an application to review and set aside the arbitration award of

the first respondent (the Commissioner) issued on 12 November 1997. The application is made in terms of section 145 of the Act. The second respondent opposes the application and also applies to have the award set aside in terms of section 158(1)(g) of the Act.

[2] These proceedings were launched on 10 March 1998. In its answering affidavit second respondent did not dispute that the award was served on the applicants on 5 March 1998. In its heads of argument it took the point that the proceedings were launched outside of the six week period required by section 145(1)(a). At the hearing, the second respondent indicated its consent to this court condoning the late filing of the application. In return, the applicant does not object to the late filing of affidavits by the second respondent. Both failures to comply with the prescribed time periods are condoned.

The facts

[3] The applicant was dismissed by the second respondent on 23 December 1996. He referred a dispute about his alleged unfair dismissal to the CCMA. The dispute was not resolved by conciliation and was arbitrated by the Commissioner on 30 October 1996. An

arbitration award was issued on 12 November 1997. The Commissioner found that the second respondent had shown that there was a fair reason for the dismissal and that it related to the capacity of the applicant. She also found that the second respondent had failed to follow a fair procedure prior to dismissing the applicant on grounds of his incapacity. The Commissioner ordered the second respondent to pay to the applicant compensation equal to three months salary, this being the sum of R4500,00.

[4] The Commissioner considered that the disciplinary procedures followed by the second respondent in relation to the applicant's misconduct (late coming and insubordination) to be correct but found that the misconduct was not sufficiently serious to warrant dismissal.

Grounds for review

[5] The applicant contends that the Commissioner committed a defect as contemplated by section 145 in that she exceeded her powers in terms of section 194(1) of the Act. Section 194(1) provides -

" if a dismissal is unfair only because the employer did not follow a

fair procedure, compensation must be equal to the renumeration 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 renumeration on the date of dismissal. Compensation may however, not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim."

The applicant contends that the Commissioner exceeded her powers by exercising a discretion to grant less compensation than an amount equal to the renumeration that the applicant would have received for the period from his dismissal (23 December 1996) to the last day of the hearing(30 October 1997). The Commissioner awarded three months compensation; the period referred to in section 194(1) was ten months and one week.

[6] At the time of the arbitration, there was no settled law on how compensation as contemplated by section 194(1) should be calculated. There were conflicting decisions by the Labour Court and academic authorities were divided as to the proper interpretation of section

194(1).On 1 September 1998 the Labour Appeal Court ended this jurisprudential controversy when it handed down its decision in the matter of JOHNSON & JOHNSON (PTY) LTD v CHEMICAL WORKERS INDUSTRIAL UNION (Case No.PA15/97, unreported). Section 194(1) was interpreted to mean that compensation for procedural unfairness must be awarded - "in accordance with the formula set out in section 194(1) : nothing more, nothing less" [at para [40] p.17]

The compensation, said the Labour Appeal Court - "is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right (to a fair procedure) and it is punitive to the extent that an employer who breached the right must pay a fixed penalty for causing that loss." [at para [41] p.17]

[7] The Commissioner apparently recognised the rigid nature of the formula prescribed by section 194(1), but in attempt to ensure fairness to both parties she made an award that would: "reflect the intention and spirit of the law, rather than the letter of the law" [p.15 of the bundle]

She considered what she regarded to be the legislature's intention that disputes be speedily processed through the CCMA so that an arbitration

award would be conducted no more than three months after the dispute had been referred for conciliation. The dispute she was required to arbitrate had taken considerably longer to be processed through the CCMA.

[8] By giving the applicant something less than the amount calculated in terms of the formula set out section 194(1), the Commissioner exercised a discretion that the statute does not give her. In this sense she committed a gross irregularity and/or exceeded her powers. The result is that there is a defect in the arbitration proceedings constituting grounds to set aside the award as contemplated by section 145 of the Act.

[9] At the time of his dismissal, the applicant's renumeration was R1500,00 per month. The Commissioner awarded three month's compensation amounting to R4500,00. If she had applied the formula as required by section 194(1), the amount of compensation awarded to the applicant would be closer to R15 000,00.

[10] The applicant submits that this court should set aside the award and substitute for it an amount of compensation calculated in accordance with the formula prescribed by section 194(1).

The cross review

[11] The second respondent does not only oppose the application. It has applied to have the Commissioner's award reviewed and set aside in terms of section 158(1)(g).

[12] Review of arbitration proceedings under the auspices of the CCMA must proceed under section 145 of the Act. This court cannot invoke the power of review given to it in terms of section 158(1)(g) to set aside CCMA arbitration awards. [See CAREPHONE (PTY) LTD v MARCUS N.O. AND OTHER (LAC)CASE NO. JA52/98, unreported, at para 29]

[13] At the time the second respondent's review proceedings were delivered the law was not settled as to whether CCMA arbitration awards could be reviewed in terms of section 145 **and** section 158(1)

(g) or only the former.

[14] The applicant opposes the cross review. On his behalf, Mr Rossouw argued that the application should be treated as invalid and dismissed because it has brought under section 158(1)(g). Mr Snyman, for the second respondent, countered this argument with the submission that there is no longer any difference between the grounds for review permitted by section 145 and those permitted by section 158(1)(g). He makes this submission having regard to the constitutional context in which section 145 has been interpreted by the Labour Appeal Court in *CAREPHONE* (supra).

[15] It is not necessary for me to make a finding as to the correctness of Mr Snyman's submission that the grounds for review permitted by section 145 and section 158(1) (g) are now exactly the same. To succeed with the cross review the second respondent must show that this court can and should proceed to hear its application in terms of section 145 even though it was brought in terms of section 158. It must show that the grounds for review on which the second

respondent relies in its papers are defects as contemplated by section 145 and that the papers make out a case for review within the meaning of that section. In other words, this court does not adopt a formalistic approach and it does not automatically follow that the cross review must fail because it was brought under Section 158(1)(g). This court will look beyond the legal label to the substance of the application. Each case will have to be decided on its facts.

[16] The court must also be satisfied that the respondents are not prejudiced by the matter being heard under Section 145 rather than section 158. The CCMA, the commissioner and the other party to the dispute must not be placed in the position where the application is heard and decided on grounds other than those pleaded. They must know what case they are required to oppose. An applicant for review is confined to the grounds set out in the founding affidavit and Notice of Motion. Accordingly this court must not only ask itself whether the grounds for review in an application made under section 158(1)(g) are capable of being considered as grounds to set aside in terms of section 145. It must also be satisfied that from the founding papers the

respondents knew what case they had to meet .

[17] The second respondent attacks the award on three fronts. Its view is that the Commissioner should have found

1. the dismissal to be procedurally fair;

2. that the applicant's misconduct was sufficiently serious to justify dismissal; and

3. that the amount of compensation due to the applicant in terms of section 194(1) was to be reduced by the three month period of delay for which the second respondent was not responsible.

[18] In its answering affidavit it formulates its grounds for review as follows

1. There is no basis in fact or in law for the first respondent to find that the procedure adopted by the second respondent in dismissing the applicant was unfair. The Commissioner misdirected herself when she found that the Act requires something other than a disciplinary procedure to be followed in cases of incapacity or poor performance. The second respondent says that the applicant was counselled , given an

opportunity to improve and warned that a failure to improve would lead to his dismissal. [para 15.5 , p.30]

2. The Commissioner's finding that there was no procedural fairness was clearly wrong. In the circumstances she committed material errors of fact and law in this regard and misdirected herself pertaining to the evidence presented. [para 18.2, p.31]

3. The Commissioner should have reduced the compensation awarded to take into account delays nor occasioned by the second respondent.

[19] In its heads of argument, the second respondent's formulates its attack of the Commissioner's award as follows

1. The Commissioner's finding that poor performance is not misconduct is so grossly incorrect that no reasonable arbitrator ought to come to such conclusion;

2. The Commissioner's finding that offences of insubordination and late coming did not justify dismissal are so grossly incorrect that no reasonable arbitrator should come to such conclusion. (In this regard particular reliance is placed on the existence of a valid final written warning for identical offences);

3. The Commissioner's finding that the second respondent had failed to follow proper procedures in relation to the incapacity of the applicant is the result of her having misdirected herself. There is no provision in the Act which compels an employer not to conduct a disciplinary hearing or follow a disciplinary route in the event of dismissing an employee for poor performance;

4. No compensation should be given for delays in the arbitration process if these are not attributable to the employer. To the extent that delays were caused by either the applicant or the CCMA these should be deducted from the compensation awarded in terms of section 194(1).

[20] Before considering whether the second respondent is entitled to have its application for review heard in terms of section 145 (having filed it in terms of section 158) I wish to deal with grounds for review raised for the first time in the second respondent's heads of argument. The second respondent's attack on the Commissioner's finding that the dismissal was substantively fair is raised for the first time in its heads of argument. The Commissioner's findings on substantive fairness are not

challenged by the second respondent in its papers. In para 36.1 of the answering affidavit it is explicitly stated that second respondent does not dispute these findings and that they should stand as uncontested. Accordingly, neither the applicant nor the Commissioner have been given an opportunity to consider this attack and to formulate a response to it. The applicant's replying affidavit is not directed to countering a review on this ground. In the circumstances I am not willing to entertain this ground for review and confine myself to a cross review of the award on the grounds set out in the second respondent's answering affidavit. [See COUNTRY FAIR v COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS (1998) 19 ILJ 815(LC) at 818]

[21] Turning then to the grounds for review contained in the second respondent's answering affidavit, the question must be asked whether they are sufficient to have the award reviewed and set aside as contemplated by section 145 of the Act. Do they show a defect in the proceedings? Having elected to rely on section 158, the second respondent is not automatically at liberty to have the matter heard and

decided in terms of section 145. However, as indicated above this court should not be overly technical in this regard. By this I mean that if the grounds for review on which the Section 158(1)(g) application is based are capable of being construed as defects as contemplated by section 145, the applicant should not be automatically disqualified from arguing his case on this basis, simply because he has referred to section 158(1)(g) in his notice of review. If the respondents have had an opportunity to address these attacks there would be no prejudice. In such a case, form should not be permitted to prevail over content. As I said each case will have to be examined to see what prejudice may arise if an application brought under Section 158 is dealt with in terms of Section 145.

[22] The Second Respondent attacks the Commissioner's finding that the employer failed to follow a fair procedure in relation to the applicant's incapacity. She found that the applicant had failed to meet the required performance standard, but that the employer failed to follow an appropriate procedure in relation to the poor work performance. The Commissioner did not regard the procedure followed by the employer in disciplining the applicant for misconduct

to be appropriate or sufficient. She found that the employer had not done enough to assist the applicant in meeting the required performance standards. [page 15 of the bundle]

[23] The Second Respondent submits that the above findings are defects within the meaning of Section 145 because they are so grossly incorrect that no reasonable Commissioner should have made them. It contends that the Commissioner misdirected herself when she found that it is not appropriate for an employer to follow disciplinary procedures in cases of poor performance or incapacity.

[24] The Labour Relations Act, 1995 ("the Act")treats incapacity as something different to misconduct. See for example Section 188(1)(a). The Code of Good Practice: Dismissal, in Schedule 8 of the Act also makes this distinction [See item 2(2)]. The Code provides guidelines for when it would be fair to dismiss for misconduct and what procedures should be followed (See items 3, 4 and 7). It deals separately with incapacity in the sense of poor work performance (See items 8 and 9). In this regard the Act and the Code follow the

approach of the International Labour Organisation concerning fair termination of employment (See Convention 158 and Recommendation 166, both of 1982, concerning termination of employment of at the initiative of the employer). The Act and the Code also reflect the jurisprudence that emerged from the Industrial Court and the Labour Appeal Court under the old labour relations legislation. In the circumstances I do not think that it can be said that the Commissioner misdirected herself or was grossly incorrect in making a distinction between misconduct and incapacity and applying the Code's discreet guidelines for dismissal based on an employee's incapacity.

[25] At the hearing the second respondent argued that the Commissioner had exceeded her powers because her award (in relation to procedural unfairness) was not justifiable in terms of the reasons and evidence before her. Mr Snyman argued that the Commissioner reached the wrong conclusion because she misdirected herself in relation to the evidence before her. In this regard he relied on the *CAREPHONE* decision of the Labour Appeal Court (supra).

[26] In making these submissions I do not think Mr Snyman gives sufficient weight to the distinction between an appeal and review proceedings. Mr Snyman argued that the Commissioner should have found that in the course of the disciplinary procedures instituted by the second respondent to deal with the applicant's misconduct, the applicant was counselled, trained and put on warning that continued poor performance could result in dismissal. The Commissioner adopted a different view. Even if Mr Snyman had persuaded me that she was incorrect this would not be sufficient grounds to review and set aside the award. A review is not the same as an appeal. The Labour Appeal Court was at pains to maintain this important distinction in *CAREPHONE*. In review proceedings, a judge of this court is not permitted to enter the merits in order to substitute her own opinion on the correctness thereof, but only to determine whether the outcome is rationally justifiable.

[See CAREPHONE para [36] p.16]

[27] I am not of the view that the Commissioner can be said to have exceeded her powers as contemplated by CAREPHONE. Applying the test formulated in CAREPHONE by asking the

question: Is there a rational objective basis justifying the connection made by the Commissioner between the material properly available to her and the conclusion she arrived at? I am of the view that the Commissioner's decision is justifiable and that she does not exceed her powers.

[28] The last ground for review on which the second respondent relies is that the Commissioner failed to take into account delays that were occasioned by someone other than the second respondent so as to reduce the amount of compensation awarded to the applicant. Section 194(1) puts it differently. It provides "compensation **may** however not be awarded in respect of any unreasonable period of delay that was **caused by the employee** in initiating or prosecuting a claim" (own emphasis)

[29] The second respondent has not shown that the Commissioner committed a gross irregularity or exceeded her powers by failing to reduce the compensation awarded in terms of this subprovision.

[30] In conclusion the second respondent's cross review must fail. As

set out in [8] above the applicant's review succeeds. However I do not intend to order the second respondent to pay the applicant's costs. In exercising this discretion I have given weight to the fact that the Labour Appeal Court's decision in JOHNSON & JOHNSON (supra) was delivered some time after these proceedings had been launched. However, I find no reason, in law or equity, why costs should not follow the cause in the failed cross review brought by the second respondent.

[31] The following order is made : -

(1) The award made by the Commissioner on 10 March 1998 under CCMA Case No. GA 1133 is reviewed and set aside;

(2) The following award is substituted for it -

" The respondent is ordered to pay to the applicant compensation equal to the renumeration that the applicant would have been paid between 23 December 1996 and 30 October 1997 calculated at the rate of R1500,00 per month."

(3) The second respondent's application to review and set aside the arbitrator's award is dismissed;

(4) The second respondent must pay the applicant's costs.

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SEADY A J

For the applicant : Advocate G.J. Rossouw

For the respondent: Mr S. Snyman from Snyman Van der Heever Heyns Inc.

Date of hearing: 23 October 1998

Date of judgement: 5 November 1998