IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J 1053/98

In the matter between:

VISTA UNIVERSITY **Applicant**

and

EG JONES **First Respondent**

M MILES N.O. **Second Respondent**

JUDGMENT

BASSON J

1. The applicant, Vista University, prayed for an order reviewing and setting aside the arbitration award made by the second respondent, a commissioner of the Commission for Conciliation Mediation and Arbitration ("the CCMA") in terms of which he found that the conduct of the applicant in refusing to promote the first respondent (Dr EG Jones) constituted a residual unfair labour practice in terms of item 2(1)(b) of part B of schedule 7 of the Labour Relations Act 66 of 1995 ("the Act").

2. This item defines such unfair labour practice as "any unfair act or omission that arises between an employer and an employee, involving- ... the unfair conduct of the employer relating to the promotion ... of an employee ...". A dispute about such

alleged unfair labour practice must be referred in writing to the CCMA (in a case such as the present where no bargaining council has jurisdiction) and the CCMA must attempt to resolve the dispute through conciliation in terms of the provisions of item 3(1), (2) and (3) of part B of schedule 7 of the Act.

3. If the dispute remains unresolved and if such dispute is about an act or omission referred to in item 2(1)(b) (such as the dispute *in casu*) any party may request that the dispute be resolved through arbitration (item 3(4) of part B of schedule 7 of the Act). The arbitrator (the second respondent in the present matter) has the power to determine any dispute that has been referred to it in terms of item 3 on "reasonable terms" (item 4(2) of part B of schedule 7 of the Act).

4. The applicant launched the review proceedings both in terms of section 145 and section 158(1)(g) of the Act before judgment was given by the Labour Appeal Court in the case of **Carephone (Pty) Ltd v Marcus NO and Others** 1998 (10) BLLR 1326 (LAC) on 27 August 1998. This judgment by the Labour Appeal Court laid to rest the debate in terms of which conflicting judgments of the Labour Court held that review proceedings of arbitration awards made under the auspices of the CCMA stand to be reviewed in terms of section 158(1)(g) of the Act and held that such review proceedings must be instituted in terms of section 145 of the Act.

5. Section 145(1)(a) of the Act requires that (in the absence of a defect involving corruption) any party who alleges a defect in arbitration proceedings under the auspices of the CCMA may apply to the Labour Court for an order setting aside the arbitration award within six weeks of the date that the award was served on the applicant. It is common cause that the applicant lodged its application 5 days late.

6. The applicant accordingly applied for condonation of the late filing of its review application. The Labour Court has held on various occasions that condonation for such late filing can be granted. Compare, for instance, **Mthembu & Mahomed**

Attorneys v CCMA (1998) 19 **ILJ** 143 (LC) at 145B.

7. Although the application for condonation was not brought in the correct form on affidavit but was dealt with mainly in the heads of argument, the first respondent (who appeared in person) did not object to the form of the application but preferred to deal with it on the merits. The reason for the lateness was given as the fact that there were conflicting judgments of the Labour Court (referred to at paragraph [4] above) as to whether such application could be lodged in terms of section 158(1)(g) of the Act. Section 158(1)(g) contains no time requirements and therefore such application could be brought within a reasonable time. Although this explanation is not entirely satisfactory, as a diligent litigant would have taken pains to ensure to lodge within time for the purposes of both section 145(1)(a) and section 158(1)(g), this is nevertheless a tenable explanation.

8. In the event, in applying the well-known guidelines set out in **Melane v Santam Insurance Co Ltd** 1962 4 SA 531 (A) at 532C-F, I took into account the fact that it was only a very short delay coupled with a tenable explanation as well as the fact that the matter was of considerable importance and that the applicant's prospects of success was, at the very least, evenly balanced. I accordingly granted condonation for the non-compliance.

9. In the **Carephone** judgment (referred to at paragraph [4] above) the Labour Appeal Court held that a defect which is defined in terms of section 145(2)(a)(iii) of the Act as meaning that the commissioner concerned "exceeded the commissioner's powers" must be interpreted consistent with the supreme South African Constitution (Constitution of the Republic of South Africa 108 of 1996) in that the commissioner of the CCMA (as an administrative organ of state) may not exceed the constitutional restraints, especially in regard to the Bill of Rights contained in the Constitution (see paragraphs [16] to [22] of the judgment).

10. Reference was made especially to the administrative justice clause of the Constitution (section 33) which (pending legislation) includes the requirement of "administrative action that is justifiable in relation to the reasons given for it". The Labour Appeal Court (at paragraph [31]) held that this provision "introduces a requirement of rationality in the **merit or outcome** of the administrative decision" and that "[t]his goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety".

11. The Labour Appeal Court then proceeded to lay down guidelines in regard to this standard of review in the following terms (at paragraph [36] of the judgment):

"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order".

12. The Labour Appeal Court then further defined this test and referred to the concepts of "reasonableness", "rationality" and "proportionality" but saw no need to stray from the concept of "justifiability" itself (at paragraph [37] of the judgment):

"To rename it would not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: **is there a rational basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion that he or she eventually arrived at?** In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions of the LRA" (my underlining).

13. With the above in mind, I now turn to the facts.

14. The first respondent was called before a selection committee of the applicant on 18 June 1996. The selection committee was chaired by the Dean of the Faculty concerned and decided to promote the candidate from senior lecturer to associate professor.

15. The Vice Chancellor of the applicant who has the competence to refuse such recommendations referred this matter to the Deputy Vice Chancellor to advise him on the matter.

16. It appeared that the first respondent had not published research since 1990. In a letter to the Dean dated 17 September 1998 (annexure "J" at page 71 of the papers) the Deputy Vice Chancellor informed him that the first respondent "falls far short of the requirements for promotion to associate professor".

17. In a letter dated 27 September 1996 (annexure "K" at pages 72 to 73 of the papers), the Dean sought to explain the lack of research by stating that " ... since Dr Jones joined Vista, there was no opportunity to develop research capacity in his field of expertise" because of the fact that the department where he worked had been recently established and he had to develop both practical and tuition programmes. One of the outside members of the selection committee also wrote a letter to the Dean dated 26 September 1998 (annexure "KC" at page 76 of the papers) addressing the problem of the overruling of the decision of the selection committee on the basis of "the few publications that Dr Jones has produced" and defending the promotion on a variety of grounds.

18. On 3 October 1996 the Deputy Vice Chancellor addressed a letter to the Vice Chancellor (annexure "L" at pages 80 to 81 of the papers) stating that Policy Document 9 section 1 applies to the promotion and contains "preferable minimum standards" for appointment and promotion in an academic department, the criterion

mentioned for promotion to associate professor being a combination of "meritorious lecturing and research experience".

19. In the founding affidavit, the Vice Chancellor also makes it clear that he decided to accept the recommendation of the Deputy Vice Chancellor "rather than the recommendation by the selection committee" especially because the first respondent since his appointment as senior lecturer in 1992 "had no further research experience (or record) of note" (at paragraph 8.11 of the founding affidavit).

20. In view of his "valuable contributions to the development of Vista University and to teaching in general" the Vice Chancellor decided to approve a salary increase for the first respondent on 31 October 1996 (see annexure "H" at page 70 of the papers).
21.
22. The first respondent meanwhile had been informed by the Dean on 12 September 1996 that there was "a problem" with his promotion.

23. The first respondent "then awaited the announcement of the promotion". However, when the promotions were announced on 29 October 1996 (normally they would have been announced on 1 October) his promotion "was not amongst them" (see the evidence given by the first respondent before the arbitration as it is recorded at page 180 of the papers).

24. I am satisfied that the first respondent was given notice of the refusal to promote him when the promotions were thus announced on 29 October 1996. The Vice Chancellor points out in the founding affidavit (at paragraph 8.16(b)) that "it was not the practice at Vista University to publish or make known the fact that a staff member was not approved. Such a practice would cause serious embarrassment for and dissatisfaction amongst staff members, and therefore the practice is to announce only those who are to be promoted. Such an announcement in this case was made on 29 October 1996, and it should with respect have been obvious to the first respondent (when his name

was not under those to be promoted) that he was not successful. In this sense, therefore, I submit that the first respondent was already notified in October 1996 in a diplomatic and sensitive way that his promotion was not approved".

25. Not only is this submission supported by the evidence given by the first respondent at the arbitration (quoted above at paragraph [22]) but he responded to these submissions as follows (at page 127 of the papers in his answering affidavit): "The first respondent wishes to comment that he was not seeking for publication of the fact that his promotion was turned down but was merely trying to ascertain the reasons for such application being turned down", thereby conceding that he was notified of the fact that his promotion was refused (albeit in a "diplomatic" fashion) when the list of promotions was announced on 29 October 1996.

26. It is therefore in the light of the fact that the first respondent was merely "seeking reasons" for the Vice Chancellor's refusal to promote him that the letters that he wrote after being thus notified of such refusal on 29 October 1996 must be evaluated. It must also be noted that nothing much turns on the fact that a certain Mr Venter at the human resources department may have told the first respondent that his promotion was still pending as the first respondent, by his own admission, knew that this was not the case and the competence of this person to make such a far-reaching statement on behalf of the applicant clearly appeared to be suspect.

27. The first of such letters was dated 18 November 1996 (annexure "M" at page 82 of the papers) and acknowledged the letter of the Vice Chancellor (dated 13 November 1996) informing the first respondent of his salary adjustment. Somewhat disingeniously, considering that the first respondent already knew that his promotion was turned down (for the reasons discussed at paragraphs [22] to [24] above), he wrote that "I have no notification of the outcome of this [selection committee] meeting and would be grateful if you could shed some light on the matter".

28. The Vice Chancellor then apparently referred the request to the Deputy Vice Chancellor for attention but before he responded the applicant wrote another letter dated 3 December 1996 (annexure "N" at page 83 of the papers) with the same request.

29. The Deputy Vice Chancellor eventually responded in a letter dated 14 January 1997, referring to his debate with the Dean as early as 17 September 1996 (discussed at paragraph [16] above) and stating that "[t]he gist of all that communication is that it was felt that the recommendation for your promotion was not consistent with the requirements stipulated in Policy Document 9 for promotion to the level of associate professor, namely that there be evidence of "meritorious lecturing **and** (own emphasis) research experience."" He also pointed out that the eventual salary adjustment put the first respondent on the same scale than that of an associate professor.

30. It was clear from the gist of this letter that it did **not** constitute a notice of the refusal to promote. This had, after all, happened when the successful candidates' names were announced on 29 October 1996 and the first respondent (who was awaiting such announcement) found that his name was not published (see the discussion in paragraphs [22] to [24] above). Moreover, it is clear from the letter that it was written to provide the first respondent with the reasons for the refusal to promote him in an effort to clarify the issue and nothing more, in keeping with the first respondent's own allegation that he knew about the refusal to promote him and was merely enquiring after the reasons therefor (discussed above at paragraph [24]).

31. In a follow-up letter dated 24 January 1997 (annexure "P" at page 85 of the papers) the first respondent sought further clarification, notably as to "by what legal authority" the decision of the selection committee was overturned. He also denied that he was placed on a salary scale equal to that of an associate professor.

32. In a letter dated 19 February 1997 (annexure "R" at pages 88 to 89 of the papers) the first respondent alleged that he was "only notified of this ruling [not to promote] in your letter to me dated 14/01/97 (nearly seven months after the meeting of the selection committee) and this only after I had written two letters to the Vice Chancellor asking for notification".

33. This statement simply can not be true in the light of the first respondent's own evidence that he was awaiting the announcement of the promotions in order to ascertain whether he had been refused promotion. Further, the first respondent did not question the fact that notification to unsuccessful candidates took place by way of such "diplomatic" measures and not by way of written notification (see the discussion of this evidence at paragraphs [22] and [24] above). Moreover, the letters he had received after 29 October 1996 (even the letter of 14 January 1997 that he refers to as "notification") clearly did not have the purpose of notifying him but merely to provide reasons for a decision already taken which, by his own admission, was also all that he had wanted after the promotions had been announced.

34. Further, it is clear from the first respondent's letter of 19 February 1997 as well as from his letter of 21 August 1997 (annexure "S" at page 90 of the papers) in which he referred to a meeting with the Vice Chancellor on 6 May 1997, that the first respondent was still enquiring after "the criteria used by yourself and the Deputy Vice Chancellor (Academic) to make this decision".

35. After a settlement proposal by the Vice Chancellor (in a letter dated 10 September 1997 - annexure "T" at page 91 of the papers) to reconstitute a new selection committee was declared to be unacceptable by the first respondent, he referred the dispute in regard to the refusal to promote him as an alleged residual unfair labour practice to the CCMA for conciliation as is required in terms of item 3(1), (2) and (3) of part B of schedule 7 of the Act (discussed at paragraph [2] above).

36. The certificate of outcome of the dispute thus referred for conciliation which indicates that the CCMA was unable to resolve the dispute is annexure "V" (at page 93 of the papers). The valid issuing of such certificate is, of course, a necessary jurisdictional prerequisite without which arbitration under the auspices of the CCMA cannot take place in terms of item 3(4) of part B of schedule 7 of the Act (discussed at paragraph [3] above).

37. In his referral form, requesting arbitration under the auspices of the CCMA (annexure "A" at pages 32 to 33 of the papers), the first respondent defined the issue in dispute as follows: "that the Vice Chancellor (Professor Africa) and the Deputy Vice Chancellor (Professor Nyamapfene), **without good reason**, failed to accept the recommendation of a properly constituted promotion committee to promote me from senior lecturer to associate professor" (my underlining).

38. The applicant took a jurisdictional point (not dealt with in the papers) in its supplementary heads of argument to the effect that the CCMA did not have the necessary jurisdiction to deal with the present dispute.

39. The question arises if it is proper for the applicant to raise such legal point if it is not raised in the affidavits on which the applicant relies. I am of the view that, provided that the applicant can make out a case for its legal contentions on facts and circumstances as they appear from the papers, the applicant should not be barred from doing so as the Court should as far as possible not be prohibited from deciding a legitimate point of law. In this regard the following *dictum* in the case of **Van Rensburg v Van Rensburg en Andere** 1963 1 SA 505 (A) at 509I - 510A is informative:

"Ek is dit eens met die geleerde Regter in *Heeralal* se saak dat die woorde "facts and circumstances" meer inhou as die enkele woord "facts", maar ek kan nie instem dat dit daarom ook kontensies wat 'n aansoekdoener op sy beweerde feite wil baseer, insluit nie. "Facts and circumstances" kan ook beteken feite en omringende omstandighede in die lig

waarvan die feite beoordeel moet word. Met die oog hierop bestaan daar geen regverdiging vir die wyere betekenis, waarvoor die woorde nouliks vatbaar is nie. In iedere geval meen ek dat ‘n uitleg van die Hofreël wat die Hof sou verhinder om ‘n aansoek op ‘n regspunt uit te wys wat uit die beweerde feite ontstaan, slegs omdat die aansoekdoener nie in sy aansoek uitdruklik daarop gesteun het nie, vermy kan en moet word, anders sou dit kon lei tot die onhoudbare posisie dat die Hof deur ‘n regsdwaling aan die kant van die aansoekdoener gebonde kan wees”.

40. The first respondent also indicated that he was prepared to deal with the legal point in this fashion.

41. Item 21 of part E of schedule 7 of the Act contains the so-called transitional provisions. Sub-item (1) is applicable here and provides: “Any dispute contemplated in the labour relations laws which arose before the commencement of this Act must be dealt with as if those laws had not been repealed”. The dispute *in casu* about an alleged unfair labour practice was indeed contemplated in the labour relations laws, that is, in terms of the previous Labour Relations Act 28 of 1956 (“the 1956 Act”) the industrial court had jurisdiction to determine such dispute. The question now is whether such dispute arose prior to the commencement of the Act on 11 November 1996 in which case the CCMA would not have jurisdiction to entertain such dispute in terms of the (new) Act.

42. The Labour Appeal Court in **Edgars Stores Limited v SACCAWU & CCMA** 1998 (5) BLLR 447 (LAC) held that the answer must be sought in the 1956 Act (at paragraph [15]). Reference was made to the “prescription” periods which were calculated (in terms of section 43(3)(a) read with section 43(2) and section 46(9)(a) read with section 27A(1)(d)(i) and section 35(3)(d)(i), respectively) from the date on which the unfair labour practice was introduced, commenced or ceased and it was held “that the crucial date was the date the cause of action (based on the unfair labour practice jurisdiction of the industrial court) arose” (at paragraph [18] of the judgment).

43. An alleged unfair dismissal constituted the unfair labour practice in the facts before the Labour Appeal Court and it was thus held that "the date of dismissal constituted the date on which the alleged unfair labour practice was introduced, commenced or ceased. The 30 day and 180 day periods were calculated from the date of dismissal not from the date that the parties declared a dispute regarding the dismissal. Put differently, a dismissal dispute arose on the date of the dismissal" (at paragraph [19] of the judgment).

44. The Labour Appeal Court also held that the contention that the dismissal did not become final until the internal appeal procedure had been exhausted had to be rejected (at paragraph [20] of the judgment).

45. Applying these principles to the facts *in casu*, it appears that the refusal to promote the first respondent (the alleged unfair labour practice) took place when the first respondent was notified about this fact. This occurred when his name was not announced when the names of the successful candidates were published on 29 October 1996 (see the discussion of these facts at paragraphs [22] to [24] above). Put differently, on 29 October 1996 there was and could have been no doubt in the mind of the first respondent that the powers that be at the applicant had refused his promotion. The correspondence and communication between the first respondent and the applicant's representatives after 29 October 1996 did not take place in an effort to notify the applicant of this refusal but in order to ascertain and debate the reasons therefor, that is, the lack of "current" research after his appointment at the university in 1992 (these facts are discussed at paragraphs [25] to [33] above).

46. Moreover, it is abundantly clear from the referral to arbitration (discussed at paragraph [36] above) that the dispute that was being referred to the CCMA dealt with the fact that the powers that be "without good reason" failed to promote the first respondent. As this alleged failure was communicated to the first respondent on 29

October 1996 there can be no doubt that the alleged unfair labour practice in terms of item 2(1)(b) of part B of schedule 7 of the Act was committed on this date. Put differently, the unfair labour practice (as a single act) was **introduced** (or had commenced and ceased) on this date.

47. It therefore follows from the reasoning in the **Edgars Stores** case (discussed at paragraphs [41] to [42] above) that the dispute about this unfair labour practice arose on 29 October 1996, that is, the date of the refusal to promote.

48. It is furthermore clear from the facts that the allegation of unfairness by the first respondent related to the period between June to October 1996 when the decision not to promote him was being debated between the Dean and the Deputy Vice Chancellor and eventually culminated in a decision being taken by the Vice Chancellor not to promote him and thereby to reject the recommendation of the selection committee. This allegation did not extend to the period after 29 October 1996 when the first respondent (by his own admission) was merely enquiring as to the reasons for the refusal. Put differently, the issue in dispute, as defined also in the referral documents (at paragraph [36] above), makes it clear that the allegation of unfairness goes to the substance of the refusal to promote, that is, whether there was "good reason" for failing to promote him, that is, whether the criterion that had been applied ("research experience") was a valid criterion.

49. It follows from the above that the dispute arose on 29 October 1996 before the commencement of the Act on 11 November 1996 and that the CCMA accordingly did not have any jurisdiction to entertain such dispute. The conciliation proceedings and the issuing of the certificate stating that the dispute remained unresolved accordingly amounted to *ultra vires* acts on the part of the CCMA. In the event, the commissioner (the second respondent) also acted *ultra vires* as he did not have any jurisdiction to entertain the arbitration referral. The arbitration award accordingly falls to be set aside on review on this basis alone.

50. It can, however, also be noted that the commissioner (the second respondent) himself dealt with the jurisdiction issue in the arbitration award (at pages 41 to 42 and 50 to 51 of the papers).

51. The commissioner accepted that the events concerning the first respondent's promotion "had occurred during the months from May to October 1996" and that these were the events "leading up to the allegation" (presumably, of the unfair conduct) as well as that the issue to be decided was "whether the employer followed the laid down guidelines and practices set by the employer in assessing promotions".

52. In other words, the commissioner accepted that the issue to be decided at the arbitration was whether the applicant had "good reason" to refuse the promotion (as is also reflected in the referral to arbitration discussed above at paragraph[36]) as well as the fact that the alleged unfair conduct occurred in the period May to October 1996.

53. However, the commissioner nevertheless came to the conclusion that "the conduct of [the applicant] regarding the [first respondent's] promotional opportunities did not end conclusively before this date and indeed continued well into 1997" and that he was satisfied that "the letter from the Deputy Vice Chancellor of 14 November 1997 was "the first notification that he had received from [the applicant] advising him that his promotion had not been approved". This conclusion was, however, not supported by the facts before the commissioner.

54. First, it was clear that the allegation of unfairness (as it also appears from the referral document for arbitration) related to the fact that the applicant failed to promote the first respondent "without good reason" and there is absolutely no allegation as to the manner in which he was notified. Second, there was no evidence before the commissioner to justify the conclusion that a refusal to promote is to be communicated by way of letter. In fact, the commissioner appeared to completely

ignore the evidence of the first respondent to the effect that he had awaited the announcement of the promotions as from 1 October 1996 and that it was eventually announced on 29 October 1996 - only the successful candidates received letters, the first respondent did not. Third, the letter of 14 November 1996 could by no stretch of the imagination be construed as "notification" but amounted to an explanation as to the reasons for the refusal of promotion that had already taken place. Although the letters of the first respondent did appear to somewhat obscure this fact (even to the extent that he accused the applicant of never notifying him) it must have been clear from his evidence as well as from the gist of the applicant's letters that the first respondent knew very well that the powers that be had already taken the decision not to promote him. Last, the commissioner had himself accepted the fact that the allegation of an unfair labour practice related to the events up to 29 October 1996, that is, before the Act came into operation.

55. In the event, the conclusion by the commissioner that the dispute about the unfair labour practice arose only in September 1997 could not be justified on the facts before the arbitration. It may also be noted in this regard that the commissioner found that the dispute only arose after all the "internal procedures which attempted to resolve the dispute between the parties ended in deadlock" (at page 51 of the papers). Not only is the finding that the first respondent was exhausting his internal remedies not supported by the facts (there is namely no indication that the correspondence after October 1996 constituted recognised internal proceedings such as an appeal) but the finding is, of course, completely at odds with the principle laid down in the **Edgars Stores** judgment of the Labour Appeal Court, that is, that the exhaustion of so-called internal procedures (appeal) does not suspend the date on which the unfair labour practice was committed (see the discussion at paragraph [43] above).

56. The commissioner went even further and placed the arbitration on a wrong jurisdictional footing by adding to the dispute about whether the decision not to promote him was fair, that is, whether the applicant had "good reason", substantively

speaking, not to promote him, a second dispute about whether the "means by which this decision was ultimately taken" (including the conduct by the applicant after 29 October 1996) was "procedurally" fair (at page 51 of the record).

57. The commissioner justified this venture into the realm of "procedural fairness" by reference to the fact that the applicant's representative had argued that the selection committee was not properly constituted - "a procedural defect". The second respondent in his so-called explanatory affidavit (at page 99 of the papers) also tried to justify the jurisdiction to arbitrate on the procedural fairness by stating that the parties "agreed that the issues to be decided upon were those set down in the award".

58. The commissioner completely misdirected himself in regard to this jurisdictional issue. Not only was this not the dispute as defined by himself as he set out on the arbitration (see the discussion above at paragraph [50]) or the dispute that had been referred to arbitration (see the discussion above at paragraph [36]) but he failed to appreciate that he may only arbitrate such dispute that had initially been referred to the CCMA for conciliation.

59. It was namely not a case of voluntary arbitration where the parties agree on the arbitrator's terms of reference. Agreement by the parties or, even worse, arguments put forward by one of the parties can never clothe the arbitrator with jurisdiction but he or she obtains jurisdiction only in regard to the dispute that had been referred to conciliation and the ambit of such dispute is determined by examining the relevant facts that present themselves to the arbitrator.

60. As the findings of the commissioner in regard to the "procedural unfairness" of the refusal to promote clearly influenced the outcome of the arbitration, these unjustified conclusions are a further basis for review of the award in terms of section 145(2)(a)(iii) of the Act.

61. In the light of the finding that the award stands to be reviewed on the basis of the absence of jurisdiction (see paragraph [48] above), it is not required for me to enter upon the terrain of the merits of the decision of the commissioner. I would, however, be remiss if I do not point to another obvious defect in the arbitration award.

62. The commissioner accepted the fact that Policy Document 9 contained the criteria for promotion as well as the fact that one such criterion was "research experience". He also accepted the fact that the first respondent had published no research since 1990. The commissioner further appeared to understand that the main objection to the promotion was the fact that the first respondent did not produce any "current" research or research that had occurred whilst the first respondent was employed by the applicant as from 1992. After all, the Deputy Vice Chancellor had **consistently** taken this position since September 1996 and the letters of the applicant to the first respondent after 29 October 1996 also underlined this fact (see the discussion at paragraphs [28] to [33] above). The commissioner, however, appeared to give much more weight to the fact that a concept document (which was shown to the applicant long after the decision had already been taken) was tantamount to "moving the goalposts" and concluded that the decision by the Deputy Vice Chancellor and the Vice Chancellor was "purely an arbitrary one".

63. The facts certainly do not support such a far-fetched conclusion and it is clear that this conclusion had materially affected the outcome of the arbitration. Even if it is accepted that Policy Document 9 does not specifically refer to "current research", the fact that this document refers to "research" experience and the fact that absolutely no research was published over the last fourteen years were undisputed. The applicant therefore, at the very least, considered its decision on the merits.

64. It must be remembered that arbitrariness is defined as a very severe defect. In **Johannesburg Liquor Licencing Board v Kuhn** 1963 4 SA 666 (A) at 671C-D it was held that "[a]rbitrariness connotes caprice, or the exercise of the will instead of

reason or principle, **without a consideration of the merits**"(my underlining).

65. There was accordingly no rational basis for the commissioner to have made a finding of arbitrariness on the material available to him at the arbitration and, in applying the standard of review enunciated by the Labour Appeal Court in the **Carephone** judgment (at paragraph [12] above), the arbitration award stands to be reviewed in terms of section 145(2)(a)(iii) of the Act.

66. I have a wide discretion to make an order as to the payment of costs, according to the requirements of the law and fairness (section 162(1) of the Act). The principle that costs are to follow the result is a sound one provided that it is tempered by the requirements of fairness. I have to remind myself that there is a continuing employment relationship between the applicant and the first respondent. I am also mindful of the fact that the first respondent has (as a layperson) represented himself whilst the applicant saw fit to engage the services of two counsel. On the other hand, the issues were rather complex, calling for legal expertise. In the light of all of the factors, I consider it fair that the first respondent is to pay the applicant's costs but including the costs of one counsel only.

67. In the event, I make the following order:

68. The arbitration award made by the second respondent under the auspices of the Commission for Conciliation Mediation and Arbitration (in case no GA 19568) is reviewed and set aside.
69. The first respondent is to pay the applicant's costs, including the costs of one counsel only.

_____

—

Basson J

Date of hearing:	3 November 1998
Date of judgment:	9 November 1998
Appearing on behalf of the Applicant:	Adv MSM Brassey SC and appearing with him Adv MM Oosthuizen instructed by Maponya Inc
Appearing on behalf of the First Respondent:	Dr E G Jones (in person)