IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: J752/97

In the matter between:

ABDULL, COLLEEN FIRST APPLICANT

HASSIN, YOLANDE SECOND APPLICANT

and

CLOETE, N.O., C FIRST RESPONDENT
LIMITED EDITIONS (PTY) LTD t/a GLOMAIL SECOND RESPONDENT
COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION THIRD RESPONDENT

JUDGMENT

1] The applicants in this matter, Colleen Abdull and Yolande Hassin, seek to review the award of a part-time commissioner of the Commission for Conciliation Mediation and Arbitration ("CCMA") handed down on 6 August 1997.

2] The applicants were dismissed by their previous employer, the second respondent, during April 1997. They referred their dismissals to the CCMA and the matter was duly arbitrated by the first respondent. His award is as follows:

" **AWARD**

Because of similarities in cases considered them together as agreed by both parties.

Having heard all the evidence and after due consideration of all the relevant aspects the following decision has been reached: Uphold dismissal. Respondent to pay each applicant 3 (three) months salary (as per date of dismissal) as compensation (see reasons for award). Money to be paid to applicant on or before 15 August 1997.

The reasons, very briefly, for the aforesaid decision are as follows: No doubt of applicant's intentions when committing acts of misconduct. Y Hassin admitted and apologised, Abdull well aware of stalling effect on credit controllers.

- Applicant did not suffer any substantial material loss. (Y Hassin R8.36, Abdull - no loss - cashflow)
- No procedures or rules regarding staff accounts.
- Respondent's systems open to abuse.
- Allegations of other employees committing similar offenses are probable as per documented evidence.
- Applicants not aware of any rules or procedures.
- Accept some breach in trust relationship.
- Question appropriateness and severity of sanctions. (First offense - absence of procedure and rules - both employees seem capable of rehabilitation.)"

3] Pursuant to the application for review, the first respondent filed an affidavit (the explanatory affidavit) in which he sought to amplify the reasons for his award.

4] It will be noted that in the award the first respondent stated rather baldly **"Uphold dismissal"**. It is not clear from the award itself what is meant by this statement. Did the first respondent mean that he regarded the dismissal as an appropriate sanction? This is unlikely, because later on in his award he states **"Question appropriateness and severity of sanctions"**. Did the first respondent mean that the dismissal was unfair, but that some award other than reinstatement should be made? The explanatory affidavit, however, seeks to justify and defend the dismissal. Despite a

careful perusal of the award, it is not possible to say with certainty precisely what the first respondent meant when he said **"Uphold dismissal"**. However, the problem is further compounded when one has regard to the first respondent's amplified reasons contained in his explanatory affidavit. There he says **"I was satisfied on a balance of probabilities that the applicants were guilty of misconduct ..."** He adds **"What I meant with this statement, in my award, that I 'uphold dismissal' was that I uphold the second respondent's finding that the applicants were guilty of an offence."** However, this is no explanation of the meaning of the words **"uphold dismissal"**. The affidavit does not explain what the employer, the second respondent, should have done having found that the applicants were guilty of an offence. The first respondent is clearly expressing some approval of the conduct of the second respondent in relation to the dismissal. It is not clear what conduct and to what extent he is expressing such approval. He is clearly not finding that the dismissal was fair, because as a prerequisite to his award of compensation he must have found that the dismissal was unfair.

5] As was pointed out by Mr Kennedy, who appeared on behalf of the applicants, the confusion is compounded, because procedural fairness was not in issue. Accordingly, the issue before the first respondent was confined to one of substantive fairness. The first respondent, therefore, could not have awarded three months' compensation as he did to compensate for some procedural unfairness. He must therefore have found the dismissal to be substantively unfair. In this context, what is meant by **"uphold dismissal"** is even less clear. Indeed, a perusal of the award read with the

explanatory affidavit of the first respondent shows that, on the one hand, he seeks to justify the dismissal, but on the other, is strongly critical thereof.

6] Further, in his award, the first respondent states **"Allegations of other employees committing similar offences are probable as per documented evidence"** . It is reasonable to assume that consistency in discipline was an issue which was present to the first respondent's mind and influenced him when he made his award. However, in his explanatory affidavit, the first respondent stated in this regard **"The second respondent had not acted inconsistently vis-a-vis other employees whom the applicants alleged had committed the same offence."** In the context of the facts of this matter, these statements are mutually contradictory. If an arbitrator in his award makes a material statement and later when he has had a chance to reflect on the matter contradicts that statement in his amplified reasons, the only inference that I can draw is that at the time he made his award he did not properly apply his mind to the matter.

7] In his award first respondent states the following: **"No procedures or rules regarding staff accounts"**. In his amplified reasons, however, the first respondent states they (the applicants) knew that in doing what they did they were contravening a rule of the second respondent relating to arrears accounts applicable to customers and they knew that this rule applied to them. Again, in the context of the facts of this matter and on the face of it, these statements are mutually contradictory. The comments made in the previous paragraph of this judgment apply equally to these statements therefore.

8] In his explanatory affidavit the first respondent states **"I believed that the sanction of dismissal was too harsh ..."** However, in the very next sub-paragraph he states **"The circumstances surrounding the dismissal was (sic) such that a continued employment relationship would be intolerable, because ... the applicants occupied a position of trust ... [and] the offence for which I found them to be guilty related to dishonesty and therefore the trust relationship had broken down irretrievably, although both applicants seemed capable of rehabilitation."** These statements compound the confusion as to what the arbitrator actually determined in regard to the dismissal. Seen from the employer's point of view, either the dismissal was justified or it was not. However, the first respondent appears both to justify and condemn the dismissal within the space of a few paragraphs.

9] Where an arbitrator does not give reasons which are capable of being understood and which are on the face of it mutually contradictory in material respects, it is not for the parties or a court on review to attempt to rescue reason from findings where no such reason is apparent in the first place. To speculate in this fashion would be for the review court to substitute its reasoning for that of the arbitrator by a process of inference. This is not permitted on review.

10] The only reasonable inference that I can draw in these circumstances is that at the time of the making of his award, the first respondent failed properly to apply his mind to the issues before him.

11] The next question for consideration is whether the first respondent's failure to apply

his mind to the issues before him as occurred in this case constitutes either misconduct in relation to the duties of the commissioner as an arbitrator or a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2) of the Labour Relations Act, 1995 ("the LRA").

12] As far as misconduct is concerned, it is at least arguable that an arbitrator will make himself guilty of misconduct in relation to his duties as an arbitrator if he fails to apply his mind responsibly and fairly to the issues before him. An arbitrator that acts in this fashion is not conducting himself in accordance with the requirements of the LRA which enjoins the arbitrator to give due consideration to the issues before him, to apply his mind thereto and to come to a reasoned conclusion. For example, section 138 of the LRA directs a commissioner to determine the dispute fairly and quickly and to deal with the substantial merits of the dispute albeit with the minimum legal formalities. This section also requires the commissioner to issue an arbitration award with brief reasons for his award. Solomon JA in Dickenson and Brown v Fisher's Executors 1915 AD 166 stated (at 176):

> **"It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong conclusion on a question of fact or of law, and in such a case I am not prepared to say that a Court might not properly find that there had been misconduct on his part."**

13] However, there is well known authority in our law to the effect that the provisions of section 33(1) of the Arbitration Act, 1965, which are similar in their terms to the provisions of section 145(2) of the LRA are to be construed on a strict and narrow

basis. In Hyperchemicals International (Pty) Ltd v Maybaker Agrichem International (Pty) Ltd 1992(1) SA 89 (W) Preiss J said the following (at 100):

> **"Mistake, no matter how gross, is not misconduct; at most, gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator. In such a case a court might be justified in drawing an inference of misconduct. The award would then be set aside, not for mistake, but for misconduct."**

14] It is not necessary for me to say any more in regard to the meaning of the word "misconduct" as that word is used in the LRA.

15] As far as the notion "gross irregularity" is concerned, in Bester v Easigas (Pty) Ltd and Ano. 1993(1) SA 30(c) at 42J ff, Brand AJ reviewed the authorities in relation to the meaning of the provisions of section 33(1)(b) of the Arbitration Act, which provides for the setting aside of an award where an arbitration tribunal **"has committed any gross irregularity in the conduct of the arbitration proceedings"**. Brand AJ stated (at page 43B) **"... it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined".** In drawing this conclusion Brand AJ cited with approval the following dictum of Mason J in Ellis v Morgan; Ellis v Dessai 1909 TS 576 at 581:

"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the method of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

16] In Goldfields Investment Limited and Ano. v City Council of Johannesburg and Ano. 1938 TPD 551 at 560 Schreiner J stated as follows:

"It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. Of course, even the first class are only material inasmuch as they prevent, or are deemed to prevent, the magistrate's mind from being properly prepared for the giving of a correct decision. But unlike the second they admit of objective treatment, according to the nature of the conduct. Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice. The law, as stated in **Ellis v Morgan (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its**

misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.

17] The reasoning of Schreiner J appears, in the context of the facts of the present case, to be an appropriate description of the meaning of the term **"gross irregularity"** as it is used in the LRA. Whether or not this approach is precisely the same as the approach in the cases reviewed by Brand AJ in the Bester case or whether it is precisely the same as that adopted by Preiss J in the Hyperchemicals International case is a topic of debate that I do not intend to enter. As is apparent from those judgments and indeed from recent judgments of this Court (see, for example, Linda Deutsch v Mr and Mrs Pinto, Labour Court, case number J28/97, Landman AJ), the fact that, under the provisions of the Arbitration Act, the parties are engaged in a voluntary process is an important policy consideration which appears to underpin the approach taken in the decisions of the High Court referred to. Such policy considerations are not present in applying the provisions of the LRA. Such other policy considerations as there may be present in applying the review provisions of section 145 of the lra, such as the need to resolve labour disputes speedily and efficiently, do not persuade me that I should not apply the reasoning of Schreiner J as set out in the quotation above.

18] In the case at present under consideration, there is no indication that the first respondent acted in bad faith. Notwithstanding his failure to apply his mind, there is no suggestion that the arbitrator was guilty of improper or mala fide conduct in relation to his duties.

19] The first respondent in this matter appears to have conducted himself in a manner which Schreiner J would have described as a latent gross irregularity. An examination of his reasons indicates that he has failed to appreciate what the LRA requires of him when arbitrating a dispute referred to the CCMA. To paraphrase the words of Schreiner, J he has misconceived the whole nature of the enquiry and his duties in connection therewith. It is not sufficient merely to record a number of random and often mutually contradictory observations and then, in an apparent attempt to resolve all these, to conclude that, as was done in this case, an award of monetary compensation is appropriate. The arbitrator is obliged to resolve apparent contradictions which are essential to his decision and reasons and to make findings thereon. These findings must be reasoned findings. Of course, these reasons may be brief. Once he has made these findings, he is further obliged to apply the provisions of the LRA in determining what relief he should grant. In this context, a complete failure to make the necessary decisions or findings in a manner which is capable of reasonable understanding, constitutes a gross irregularity as defined in section 145 of the LRA.

20] Even if I am wrong in this approach, however, I am of the view that an applicant for review of an arbitration decision of the CCMA may rely on the provisions of section 158(1)(g) of the LRA. In terms of this subsection of the LRA an arbitration award is, amongst other things, required to be reasonable. This, most certainly, the award at present under consideration, is not. As my observations in regard to the applicability of section 158(1)(g) of the LRA are obiter I do not intend to provide full reasons for my views in this regard. These reasons have already been provided in other

judgments of this Court. (See, for example, Kynoch Feeds (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & Others, Labour Court Case No. J829/97, Revelas J).

21] I should perhaps note that the second respondent does not oppose the application for review. However, in the light of the attitude of the first respondent as appears from the papers, I felt it necessary to provide these reasons.

22] Accordingly I make the following order.

24.1 The arbitration award of the first respondent of 6 August 1997 (CCMA case numbers GA6287 and GA6114) is reviewed and set aside.

24.2 The disputes which are the subject matter of the CCMA cases referred to in paragraph 1 of this order are remitted to the Commission for Conciliation, Mediation and Arbitration for their resolution through arbitration by an arbitrator other than the first respondent.

24.3 No order is made as to costs.

DATED AT JOHANNESBURG ON THIS 27 DAY OF FEBRUARY 1998.

P J PRETORIUS, AJ