IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: J852/97

In the matter between:

SHOPRITE CHECKERS (PTY) LTD APPLICANT

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION FIRST RESPONDENT

MOAHLOLI, ADVOCATE K SECOND RESPONDENT

MOTLAUNG, ADVOCATE S THIRD RESPONDENT

MADIKGETLA, S FOURTH RESPONDENT

SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION FIFTH RESPONDENT

JUDGMENT

A. THE PARTIES

1] The applicant in this matter is Shoprite Checkers (Pty) Limited. It was the employer

of Selina Madikgetla, the fourth respondent (the employee), prior to her dismissal on 4 December 1996. The second respondent is advocate K Moahloli (the arbitrator), a Commission for Conciliation Mediation and Arbitration ("CCMA") commissioner who presided over the arbitration proceedings relevant to this application. The third respondent is advocate S Motlaung, also a CCMA commissioner, who presided over the conciliation proceedings relevant to this application. The fifth respondent is the South African Commercial Catering and Allied Workers' Union (the Union) which represented the employee at the arbitration proceedings and also in this application.

2] This is an application for the review and setting aside of an arbitration award of the arbitrator on grounds which are set out below.

B. THE FACTS

3] On 3 December 1996 the applicant gave the employee, notice of a disciplinary enquiry to be held the following day, 4 December 1996.

4] The disciplinary enquiry was duly held on 4 December 1996. It was concluded on that day.

5] The employee was found guilty of the charges levelled against her and she was dismissed, also on 4 December 1996.

6] The employee appealed against her dismissal. The appeal was held on 8 April 1997

and she was informed of the outcome of the appeal on 14 April 1997. The appeal was unsuccessful.

7] On 17 April 1997 the employee referred the dispute concerning her dismissal to the CCMA for conciliation. The conciliation proceedings were held on 15 May 1997. The third respondent presided.

8] It was common cause that during the conciliation proceedings it was clear to all concerned, including the third respondent, that the employee had in fact been dismissed on 4 December 1996.

9] The conciliation proceedings failed to resolve the dispute and the matter was referred to arbitration.

10] Prior to the arbitration and on 15 May 1997 the representatives of the employee and of the applicant entered into a verbal agreement to the effect that the only issue in dispute at the arbitration would be whether the applicant had made itself guilty of procedural unfairness in giving the employee less than 24 hours' notice of her enquiry.

11] The arbitration proceedings were conducted on 24 July 1997. The arbitrator presided over these proceedings.

12] The arbitrator determined that the employee's dismissal had been unfair because she

had not been given sufficient notice of the disciplinary enquiry. Compensation was awarded which was equivalent to the employee's monthly remuneration for the whole period between the date of dismissal and the date of the arbitration.

13] This application for review has been brought in terms of section 158(1)(g) of the Labour Relations Act, 1995 ("the LRA"). In the alternative, the applicant relies on section 145 of the LRA.

14] There are in essence three grounds upon which it is sought to review the decision of the arbitrator.

14.1 Firstly it is alleged by the applicant that the dispute was not referred to the CCMA within the 30 day period provided for in section 191(1) of the LRA and that, in addition, no application for condonation for the late referral of the dispute had been made to the CCMA and no condonation had been granted. This is also the ground upon which it is sought to set aside the conciliation proceedings.

14.2 It is also alleged that the arbitrator failed properly to apply his mind to the relevant issues; and

14.3 It is further alleged that the arbitrator "exceeded his powers" in granting the employee compensation for the period from the date of dismissal to the date of the arbitration.

15] I proceed to deal with each of the grounds of review in turn.

C. THE CONDONATION ISSUE

16] The relevant facts in regard to the condonation issue are the following:

16.1 The employee was dismissed on 4 December 1997. It appears from the affidavits filed in this application that this was also the date upon which the employee's contract of employment was terminated. (See section 190(1)(a) of the LRA.)

16.2 The 30 day period within which the matter had to be referred to the CCMA in terms of section 191(1) of the LRA expired on 3 January 1997.

16.3 The matter was referred to the CCMA on 17 April 1997, more than 100 days outside of the 30 day time period.

17] The allegation that the neither the employee nor her representative, the union, made any application for condonation at the conciliation or at the arbitration stage was pertinently raised in the applicant's founding papers in this matter. This notwithstanding, neither the arbitrator nor the third respondent has come forward to say that an application for condonation was indeed made and granted or that an application for condonation was granted at the instance of either. It is suggested by the union in its affidavit that it must be assumed that such an application was granted

because the third respondent was aware of the date of dismissal and must therefore have been aware that the application was made out of time. Because the third respondent conciliated the dispute and the arbitrator proceeded to arbitrate the dispute it must be assumed, contended the union, that an application for condonation had been granted.

18] Having regard to the papers as a whole, I am not prepared to make the assumptions as I have been invited to do by the union. The conclusion is on the papers inescapable that no application for condonation was made by the employee or the union and no condonation was granted by either the arbitrator or the third respondent.

19] Section 191(1) of the LRA reads:

> **"If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to .... the Commission ... "**

Section 190(1) of the LRA reads:

> **"(1) The date of the dismissal is the earlier of -**
>
> **(a) the date on which the contract of employment terminated; or**
>
> **(b) the date on which the employee left the service of the employer."**

Section 191(2) of the LRA reads:

> **"If the employee shows good cause at any time, ... the Commission may**

permit the employee to refer the dispute after the 30-day time limit has expired."

20] A CCMA commissioner who seeks to apply the provisions of section 191(2) read with sections 191(1) and 190(1) of the LRA is enjoined to make a factual enquiry as to whether the referral is indeed out of time. In this regard the date of dismissal as contemplated in section 190(1) of the LRA must be determined. Whilst the day on which an employee is notified of the dismissal will ordinarily be the "date of dismissal" as contemplated in section 190(1) of the LRA, this is not always and necessarily the case. It may be that the employee did not leave work on the date of dismissal, but remained in employment until the date of the appeal. It may also be that the contract was not terminated at the date of dismissal, but merely suspended pending the appeal. All these are relevant factual considerations when dealing with questions of condonation.

21] Further, section 191(2) enjoins an employee to show good cause before a commissioner may permit her to refer the dispute after the 30 day time limit has expired. The section makes it clear that condonation is not there merely for the asking. The employee must tender an adequate explanation for the delay. This explanation must be considered by the commissioner. Due regard must also be had to the other generally accepted requirements for the grant of condonation as contemplated in the words "good cause". (See, for example, Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others, Labour Court case no. J467/97, Gon AJ).

22] None of the above appears to have been done in this case. This being so, the third respondent had no jurisdiction to conciliate the matter. It follows that the arbitrator also had no jurisdiction to deal with the matter.

23] It was argued on behalf of the employee that because the parties had agreed that the only issue before the arbitrator was one of procedural fairness the issue of jurisdiction could not now be raised. In this regard the law is clear. Just as the arbitrator could not vest himself with jurisdiction where none existed, nor could the parties do so. In any event the arbitrator was under a duty to enquire into and to establish that he indeed did have jurisdiction. (See: Kloof Gold Mining Co. Ltd v National Union of Mineworkers and Others (1986) 7 ILJ 655 (T) at 673 E-F, and see: Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs N.O. & Others (1994) 15 ILJ 801 (LAC) at 803I - 804 E, and see: Goldschmidt & Another v Folb & Another 1974 (1) SA 576 (T))

24] I have now to decide whether the matter should be referred back to the CCMA in order for it to consider any application for condonation that the employee may wish to bring before it. I do not have to decide what the effect of the grant of condonation at this stage would be on the validity of the conciliation and arbitration proceedings which have already taken place. I say this because, for the reasons which follow, I have decided that in any event the matter should not be referred back to the CCMA.

D. THE MERITS OF THE ARBITRATION

25] This Court has, on more than one occasion now, considered the question as to whether a review of an arbitration award of a CCMA commissioner may be brought in terms of the provisions of section 158(1)(g) of the LRA. In Linda Deutsch v Mr & Mrs Pinto Labour Court case no. J28/97, Landman AJ) the following was said:

> **"It is unnecessary for the purposes of this judgment to decide whether a party who properly falls under section 145 but who wishes to review an award of a CCMA commissioner on wider grounds, can do so under section 158(1)(g). It seems that having regard to the right in section 33 of the Constitution of the Republic of South Africa, 1996 to lawful and fair administrative action, that the wider grounds may be relied upon."**

26] In the Rustenburg Platinum Mines Ltd case referred to above, Gon AJ applied the provisions of section 158(1)(g) of the LRA in considering a review of an arbitration award of a commissioner of the CCMA. The same conclusion was reached by Revelas J in Kynoch Feeds (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (Labour Court case no. J829/97).

27] I agree that an application for the review of an arbitration award of a commissioner of the CCMA acting under the provisions of the LRA may be founded upon the provisions of section 158(1)(g) of the LRA. My reasons are as follows:

27.1 Section 145 of the LRA deals specifically with the review of arbitration awards made under the auspices of the CCMA. The section provides further that such awards may only be reviewed on the limited grounds set out in section 145(2) of the LRA.

27.2 On the other hand, section 158(1)(g) reads:

> **"The Labour Court may despite section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law."**

27.3 Due regard must be given to the introductory words to section 158(1)(g), namely, "despite section 145". According to the New Shorter Oxford English Dictionary, 1993, "despite" means "notwithstanding, in spite of". In my view, giving these words their proper meaning has the result that the legislature must be presumed to have intended that notwithstanding the provisions of section 145 an application for the review of an arbitration award of a commissioner may also be brought under the provisions of section 158(1)(g).

27.4 I am aware that in the decision Edgars Stores (Pty) Ltd v The Director, Commission for Conciliation, Mediation and Arbitration and Others (Labour Court case no. P64/97) Revelas J adopted a different approach to this question. In her judgment she states:

> "In my view the phrase "despite section 145" found in section 158(1)(g) of the Act should be construed to mean nothing more than "despite **the review of arbitrators' awards on very narrow grounds in terms of section 145" All other acts (which are not arbitrators' awards) can be reviewed on any basis permissible, in law, that is, on the wider basis permissible such as on the basis of "unreasonableness".**

In my view, this interpretation puts an undue strain on the ordinary language of section 158(1)(g) and is incorrect. I note that Revelas J has herself, in the Kynoch Feeds case referred to above, departed from the views she expressed in the Edgars Stores case.

27.5 If the legislature had intended that section 158(1)(g) should not cover CCMA arbitrations, then it would have been quite a simple and obvious matter for it to have introduced that section with the words "subject to the provisions of section 145". The fact that it did not do so lends further weight to the arguments in support of the conclusion I have reached.

27.6 Section 3(b) of the LRA enjoins this Court to interpret the provisions of the LRA "in compliance with the Constitution".

27.7 Sections 33.1 and 33.2 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") must be read together with Item 23(2)(b) of schedule 6 to the Constitution. Until the legislation contemplated in section 33(3) of the Constitution has been passed, sections 33(1) and 33(2) must be read as follows:

> **"Every person has the right to-**
>
> **a) lawful administrative action where any of their rights or interests is affected or threatened;**
>
> **b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;**

c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

27.8 The provisions quoted above deal with administrative action. If the arbitration functions of the CCMA provided for in the LRA are indeed administrative actions as contemplated in the Constitution, then it would be correct in my view to interpret the LRA in such a way as to give effect to provisions of section 33 of the Constitution. This would be achieved by interpreting section 158(1)(g) of the LRA as permitting a review of a CCMA arbitration award under its provisions.

27.9 There are arguably sound policy reasons within the context of the LRA and labour relations in general for imposing the narrow review test contained in section 145 on parties who are subject to arbitration awards of the CCMA. Similar policy reasons are set out in the decision of the Appellate Division of the Supreme Court in Amalgamated Clothing and Textile Workers Union v Veldspun Ltd 1994 (1) SA 162(A) at 169F-H.

27.10 On the other hand, there are in my view equally important policy considerations for demanding of commissioners of the CCMA when they conduct arbitrations that they comply with the more stringent standards implicit in section 33 of the Constitution. Not only the interests of justice, but also sound labour relations may well be better served by arbitration decisions which comply with the standards implicit in section 33 of the Constitution than by arbitration decisions which do not necessarily comply with those standards, but serve to end labour relations disputes more speedily. Further, it must be borne in mind that the reasoning in the Veldspun

case applies to circumstances where parties have voluntarily submitted their dispute to arbitration. This is not the case where the arbitration provisions of the LRA are concerned. However, as I read the provisions of the LRA they leave this Court no choice in the matter and little, if any, room to apply policy considerations. The wording of section 3(b) of the LRA is unmistakably clear. The provisions of the LRA must be interpreted in order to give effect to the Constitution. In my view, this is the correct approach to be adopted notwithstanding the added duty that this Court has when interpreting the provisions of the LRA "to give effect to its primary objects".

27.11 The above considerations are, to my mind, decisive. They outweigh the apparent anomaly created where two very different provisions of the LRA each provides for the review of arbitration decisions of the CCMA. The argument that section 145 is entirely unnecessary if section 158(1)(g) is held to be applicable to CCMA arbitrations must yield to the considerations I have mentioned above.

27.12 Accordingly, having regard to the provisions of the LRA referred to above, I conclude that a person seeking to review an arbitration decision of a CCMA commissioner may rely on the provisions of section 158(1)(g).

28] Section 158(1)(g) of the LRA allows a "review of the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law". When a CCMA commissioner conducts an arbitration in terms of the LRA he clearly performs a function provided for in the LRA. Such a decision is therefore reviewable

on any ground permissible in law. Such a ground is to be found in section 33 of the Constitution. In terms of this section administrative action is required to be "justifiable in relation to the reasons given for it" where rights are affected or threatened.

29] It has been decided on more than one occasion in the High Court that the essence of justifiability is that the decision must be capable of objective substantiation. (See: Roman v Williams, N.O. 1997(9) BCLR 1267(C) at 1276 C, and see: Kotzé v Minister of Health and Another 1996(3) BCLR 417 (T) at 425 F-G).

30] Applying this test, an administrative decision will be reviewable where the conclusions reached by the administrative officer are not capable of reasonable justification when regard is had to the factual premises on which they are based. (See: Chaskalson et al, Constitutional Law of South Africa, Juta, p25-12, footnote 4).

31] Under the head "Analysis of Evidence in Argument" the arbitrator stated the following:

> **"In my opinion the employers shot their own case in the foot. They gave Selina shorter notice than was customarily given."**

For all practical purposes this is the sum total of the reasoning contained in the award.

32] The evidence before the arbitrator was, in summary, as follows:

32.1 It was usual for the applicant's employer to give its employees 24 hours notice of disciplinary hearings.

32.2 In this case, the employee was given notice at 15:50 on the day before her hearing. Her hearing was held at 10:00 on 4 December 1996.

32.3 Apart from a rather bald statement made by the union in opening, which does not appear to have been followed up in evidence, there was simply no evidence to the effect that the notice actually given to the employee in this case was unfair in the sense that she was unable properly to prepare for the hearing. Indeed, the evidence appears to the contrary. The employee had an adequate opportunity to deal with all relevant issues during the course of the enquiry with the assistance of union representation.

32.4 At the disciplinary enquiry no mention was made of the period of notice and no objection was raised in this regard.

32.5 In all other respects a fair procedure was followed.

33] There appears to be some uncertainty when one reads the award of the arbitrator as to whether he regarded 72 hours as being the customary period of notice. He states under the head "Background to the Issue"; "Given less than 24 hours whereas customary period is 72 hours to allow for proper case preparation and consultation with shopstewards". A perusal of the record shows that the period of 72 hours was

mentioned by the union representative in opening but not followed up in evidence. The evidence was in fact that 24 hours notice was the customary period. However, no more need be said of this aspect of the matter.

34] What the arbitrator appears to have done, is to have accepted a premise that shorter notice than the usual notice was given to the employee. This is correct. He then concluded on this basis and on this basis alone that the dismissal was not in accordance with a fair procedure. Having regard to the evidence as a whole, this is an unjustifiable conclusion when regard is had to its premise. It cannot be reasonable or justifiable to say that merely and only because a usual practice is not followed, unfairness in the sense contemplated by the LRA must necessarily be the result.

35] In addition to the above, the arbitrator does not appear to have had any regard to schedule 8 to the LRA (Code of Good Practice: Dismissal). What is stated in item 4(1) of that schedule, is the following:

> "The employee should be entitled to a reasonable time to prepare the response and to the assistance of the trade union representative or fellow employee".

The only conclusion that the arbitrator could reasonably have reached was that, in the circumstances of this particular disciplinary process, the employee was indeed given a reasonable time to prepare her response with the assistance of a trade union representative. There was no evidence led before the arbitrator to the effect that the period of notice actually given was unreasonable in that it hampered the employee's preparation to respond to the allegations made against her. As I have already said, the

evidence was to the contrary.

36] Mr Zibi who argued the case on behalf of the employee and the union contended that if one has regard to the provisions of the LRA in regard to onus (section 192(2) read with 188(1) of the LRA) it was quite reasonable of the arbitrator to find that the employer had failed to prove that the dismissal was effected in accordance with a fair procedure. There are at least two answers to this argument. First, the argument is an abstract one and is not founded in the reasons of the arbitrator. What is in issue here is whether the arbitration award is justifiable in relation to the reasons given. The arbitrator made no mention of the onus provisions in his reasons. Indeed, it is by reference to his very reasons that I have come to the conclusion that the arbitrator's decision was not justifiable. Second, the employer did in fact lead uncontroverted evidence to the effect that pursuant to the notice given to her the employee participated fully and fairly in the disciplinary enquiry with the benefit of representation. This evidence appears to have been ignored by the arbitrator.

37] I find accordingly that applying the test of justifiability as contained in section 33 of the Constitution and quite apart from the question of jurisdiction dealt with above, the award of the arbitrator would have had to have been set aside.

C. THE QUESTION OF COMPENSATION

38] There is no indication in the award that the arbitrator had regard to the proviso to section 194(1) of the LRA which states that "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 arbitrator appears merely to have assumed, without more, that the employee was entitled to compensation for the full period between the date of dismissal and the date of the arbitration. However, because of the conclusions to which I have come above, it is not necessary to deal with this matter any further.

D. CONCLUSION

39] Having come to the conclusion that I have consideration needs to be given to the appropriate order that should be made. Because section 191(2) of the LRA states that "if the employee shows good cause at any time", the commission may permit the late referral of a dispute to it, it may be argued that condonations may be granted after a conciliation or arbitration. It may be argued further that if this is done the conciliation and arbitration proceedings will be validated after the event. I make no comment as to whether the LRA allows such a result. Whatever the true position, no purpose would be served in the circumstances of this application in referring the matter back for a condonation application to be made. The reason is that the award itself is bad in law. Accordingly, it seems that the appropriate order is simply to set the award aside.

40] In regard to the question of costs, I find that it was not unreasonable of the employee and the union to have defended an award in their favour. This is especially so in the light of the uncertainty surrounding the applicability of section 157(1)(g) of the LRA to reviews of this nature. In addition, there appears to be an ongoing relationship

between the applicant and the union. In short, there are no considerations of law or fairness which persuade me that either the employee or the union should bear the costs of this application.

41] Accordingly, I make the following order:

41.1 The arbitration award of the second respondent of 5 August 1997 is hereby reviewed and set aside for lack of jurisdiction.

41.2 The conciliation proceedings presided over by the second respondent on 15 May 1997 are set aside for lack of jurisdiction.

41.3 It is declared that the said arbitration award is in any event reviewable on the grounds that it is not justifiable in relation to the reasons given for it.

41.4 No order is made as to costs.

DATED AT JOHANNESBURG ON THIS 27 DAY OF FEBRUARY 1998.

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PRETORIUS, AJ