IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO:C214/97

In the matter between :

GAL MARINE (PTY) LTD Applicant

and

BAREND CRONJE First Respondent

D.I.K. WILSON N.O. Second Respondent

JUDGEMENT
ZONDO J :

[1] This is a review application which has been brought by Gal Marine (Proprietary) Limited, the applicant, against the first and second respondents for an order reviewing and setting aside an arbitration award which was handed down on the 7th September 1997 by the second respondent in favour of the first respondent in a dismissal dispute which existed between the applicant and the first respondent. The facts surrounding the matter can be stated very briefly. I state those which are relevant for the purpose of this judgement hereunder.

[2] The applicant is involved in the diamond mining industry and

has its head office in Cape Town. The first respondent was employed by the applicant as what was referred to in the papers as a Unit General Manager. In his capacity as a Unit General Manager the first respondent was responsible for a certain ship. On the 18th December 1996 he was instructed to leave Cape Town to meet the ship in Luderitz, Namibia. He refused to do so. The first respondent's version is that the reason why he refused to go and meet the ship was that he was ill. Apparently to go and meet the ship the first respondent would have had to drive from Cape Town to Luderitz. He says the ship was only expected to dock on the 19th December and not the 18th. He said also that he had earlier on agreed to meet the ship on the 19th December before he fell ill. Subsequent to that arrangement he had been required to leave on the 18th and, as he had fallen ill in the meantime, he could not go. It is common cause that the first respondent subsequently obtained a doctor's certificate booking him off from the 19th December until the 3rd January.

[3] The version of Ms Bobby Stewart-Roberts, the Human Resources Manager of the applicant, was that initially the first respondent had agreed to leave on the 18th December to go and meet the ship but later on refused. She said he told her that he was ill and that it was easy to get a doctor's certificate and nobody could disprove a doctor's certificate because nobody could prove someone was not suffering from stress. Ms Stewart-Roberts did not think there was anything wrong with the first respondent. She thought this was a

"fraudulent excuse". Later on the first respondent had had a discussion with Mrs Ben-Tovim, one of the two directors of the applicant the other director being Mr G. Ben-Tovim, the managing director. Again the first respondent had refused to go to the ship when instructed by Mrs Ben-Tovim to go. The two had had an argument and towards the end, the first respondent had again stated that he would get a doctor's certificate. Mrs Ben-Tovim had asked the first respondent to wait for Mr Ben-Tovim who was going to arrive about 20h00 or so that evening from Johannesburg but the first respondent had said he could not wait and had walked out.

[4] The first respondent does not deny having told Ms Stewart-Roberts that he would get a doctor's certificate. Indeed, he admitted this but said Ms Stewart-Roberts put her own interpretation on what he said. He says in his answering affidavit when he had told Ms Stewart-Roberts that he was ill, she had refused to accept his word for it and, in reaction to that, he had then told her that he would get a doctor's certificate which, unlike his word, she could not challenge.

[5] The first respondent said he had an appointment to see his doctor on the morning of the 19th December. He saw the doctor on the morning of the 19th December 1996. Apparently he telephoned Ms Stewart-Roberts to ask if he should send the doctor's certificate through and Ms Stewart-Roberts had said he should drop it at her residence. By the 23rd of December the first respondent had not sent

the doctor's certificate through to Ms Stewart-Roberts' residence. On this day a driver from the applicant delivered a letter to the first respondent's place. The first respondent then gave the doctor's certificate to the driver to give to Ms Stewart-Roberts.

The letter, which was dated the 20th December, was written by Ms Bobby Stewart-Roberts. It informed the first respondent that he had been "relieved
of his position as a Unit general manager." The first paragraph of the letter referred to the first respondent's refusal to leave to go and meet the ship and said such conduct was not expected from someone of the first respondent's position or standing. The third paragraph said it appeared that the first respondent was not capable or willing to accept responsibility for his position.

[6] Subsequent to the letter referred to above, a dispute arose between the applicant and the first respondent about whether or not the termination of the contract of employment which had existed between the applicant and the first respondent was fair. That dispute was ultimately referred to arbitration by the second respondent under the auspices of the Commission for Conciliation, Mediation and Arbitration ("CCMA").

[7] The second respondent handed down an award to the effect that the first respondent had been dismissed, that his dismissal was unfair

and awarded him compensation in the amount of R103827,46 being an equivalent of the first respondent's salary for seven months plus 10 days (from the 20th December 1996 to 31 July 1997) at R13600 per month plus outstanding leave pay in the amount of R2353,48 and payment of a certain shortfall in his salary in the amount of R1000,47. The second respondent also ordered interest at the rate of 15,5 % p.a. from 30 September 1997. It is this award that the applicant now seeks to have reviewed and set aside.

[8] The case which the applicant had presented before the second respondent - which is also reflected through-out the applicant's founding affidavit in these proceedings - was that the first respondent had not been dismissed but had himself repudiated his contract of employment and that all the applicant had done was to accept that repudiation. Further, the applicant's case was that, as this was a case of repudiation, the applicant had not been under any obligation to give the first respondent a hearing before "dismissal." The second respondent found that there was no repudiation and that the first respondent had been dismissed unfairly. He also concluded that his dismissal was not preceded by a disciplinary inquiry which made the dismissal procedurally unfair. In other words, the second respondent found the dismissal to be unfair both substantively and procedurally .

[9] On all the evidence that was before the second respondent there can be no doubt that the applicant dismissed the first respondent.

There can also be no doubt on all the evidence that this is not a case where it can be said with justification that the events of the 18th December revealed a clear and unequivocal intention on the first respondent's part not to be bound by his contract of employment any longer. It is true that he refused to go and meet the ship - which was part of his duties but that is not sufficient even when considered together with the statements he is alleged to have made to Ms Stewart-Roberts on that occasion. At any rate he says he was ill and, to that extent, he produced a doctor's certificate. It is true also that on all the evidence one is left with a suspicion - indeed a strong suspicion - that he was not ill - but that is only a suspicion.

[10] In giving evidence before the second respondent, Mr G. Ben-Tovim, the managing director of the applicant, who is the person who ultimately took the decision to dismiss the first respondent said that whether or not the first respondent was ill on the 18th December had no bearing on his decision. He said the crucial issue for him was that the first respondent had not made arrangements for someone else to go and meet the ship if he could not himself go there. The second respondent summarised that portion of Mr Ben-Tovim's evidence under cross-examination in the following terms at p. 8 of his award :- "Mr Ben-Tovim stated that he was not qualified to question the medical certificate but that this was in any event not the point. The point was that, whether Mr Cronje had been sick or not, he had not arranged for someone to attend to the need of the vessel. This had

amounted to a repudiation of his contract of employment. Mr Ben-Tovim stated that he did not dismiss Mr Cronje, he accepted his resignation."

[11] During cross-examination, Mr Ben-Tovim was questioned on his evidence that he did not dismiss the first respondent. The second respondent recorded the following exchange between Mr Ben-Tovim and, apparently, the first respondent's attorney :-

"Letter stated 'relieved of duties' + 'termination of contract' - not 'accept your resignation'. ----

My instruction to BSR was to accept his resignation.

Why did she not comply with your instruction? - She did, fully. My English is not so good.

If you had instructed BSR as you say, letter would at least have mentioned resignation.

Why necessary to relieve him of his duties if he had resigned? ----

(Evasive)."

The word "evasive" was written by the second respondent to describe Mr Ben-Tovim in dealing with the last question. No answer actually appears to have been given by Mr Ben-Tovim to that last question. Later on he insisted that the first respondent had repudiated his contract of employment.

[12] Mr Rautenbach, who appeared for the applicant, argued that, to say that Mr Ben-Tovim regarded the issue whether the first respondent

was ill or not as not so important was an unfair reading of his evidence. I don't agree. It is very clear on reading the entire evidence of Mr Ben-Tovim that for him the operative reason for what he chooses to call acceptance of the first respondent's resignation -(which is actually a wrong label for what occurred because this was clearly a case of dismissal)- was that the first respondent failed to make arrangements for someone else to meet the ship in his place. I have no doubt in my own mind that, as far as Mr Ben-Tovim was concerned, if the first respondent had made those arrangements, he would not have decided to dismiss the first respondent or, he would not, as he puts it, have accepted his "resignation."

[13] The first respondent was not given a hearing on his failure to make alternative arrangements for someone else to go and meet the ship. He should have been heard on that issue as that was the issue on which his continued employment depended. There was no justification why he was not heard. In his evidence under cross-examination Mr Ben-Tovim seems not to have wanted to telephone the first respondent and hear his side of the story because he expected the first respondent to himself phone him. The difficulty with this approach is that it was Mr Ben-Tovim who knew he was contemplating taking a decision that would adversely affect the first respondent's employment. The first respondent was not aware that such was being contemplated. It would have been very easy for Mr Ben-Tovim to hear the first respondent's side of the story before making the decision to dismiss him. Even

without a formal disciplinary enquiry, he could have simply picked up the telephone and told him he was contemplating "relieving" him of his duties because of his failure to make alternative arrangements for someone to go and meet the ship and ask him why he should not make such a decision. Of course, once the first respondent had presented his side of the story, Mr Ben-Tovim would have been obliged to consider it and weigh it fairly and in a bona fide manner before making his decision. Mr Ben-Tovim's failure to give the first respondent a hearing before he dismissed him rendered the dismissal procedurally unfair.

[14] Mr Rautenbach's attack on the second respondent's finding that the dismissal was procedurally unfair was that the first respondent was the one who had made statements to the effect that he was not going to meet the ship and that he would get a doctor's certificate and nobody could prove that he was not suffering from stress. He argued further that the second respondent had had an opportunity to either qualify or explain his statements but had failed to do so. Mr Rautenbach also emphasised that the first respondent was a manager and, as such, he must have known when he made these statements that he was playing with fire and that he could well be dismissed.

[15] Mr Rautenbach's argument misses the point about the application of the audi alteram partem rule and is based on a failure to acknowledge that in this case the operative reason for the dismissal of the first respondent was his failure to make alternative arrangements

for someone else to go and meet the ship when he was himself not able to do so. That this is what made the difference was made abundantly clear in the proceedings before the second respondent by the very person who took the decision to dismiss the first respondent. There are at least two fundamental requirements of the audi alteram partem rule which must have been met in order for Mr Rautenbach's argument to apply. As stated above his argument was that the first respondent had an opportunity to be heard but had elected not to use it. The two fundamental requirements of the audi alteram partem rule are that (a) the person against whom an adverse decision is contemplated must be notified thereabout, and (b) he must be given an opportunity to make representations. In notifying such person that a decision adverse to him is being contemplated and giving him an opportunity to put his side of the case, he must be informed of the basis on which it is contemplated such decision will be made because, if he is not notified of such a basis, the right to be heard that he is given may be a hollow one which he would be unable to use effectively. An example in this regard will not be out of place. If an employer who is contemplating dismissing an employee for theft were to invite the employee to make representations why he should not be dismissed but were not to disclose that the reason he is contemplating dismissing him is that he may be guilty of theft, he would place the employee in a situation where he could either make no representations at all or he could make representations that did not deal with the real issue. Such an employer will have failed to observe the audi alteram partem rule despite the

invitation he would have extended to the employee.

[16] In this case the first respondent was never notified before his dismissal that his dismissal was being contemplated, that the basis thereof was that he had failed to make alternative arrangements for someone else to meet the ship nor was he given an opportunity to be heard on this issue. In those circumstances Mr Rautenbach's argument that the applicant had an opportunity to be heard when he was never notified his dismissal was being contemplated cannot be upheld. Accordingly the second respondent's finding that the first respondent's dismissal was procedurally unfair must stand as it is well-founded. In fact even if the second respondent had failed to apply his mind properly to the evidence before him as contended by Mr Rautenbach in coming to the conclusion that the dismissal was substantively unfair, this would not have warranted the setting aside of the entire award because this latter finding on procedural fairness would still have stood.

[17] The applicant did not complain about the amount of compensation that the second respondent awarded. Indeed the compensation that was awarded does not exceed the compensation which sec 194(1) of the Act prescribes should be awarded even in those cases where the only reason why a dismissal is found to be unfair is that the employer did not follow a fair procedure. This means that, even if the dismissal in this case were to be assumed to be

substantively fair, as long as it was procedurally unfair the compensation that would have been awarded would have been no less than that which was awarded by the second respondent. Mr Rautenbach argued - though without much visible sense of conviction - that the correct approach is that, if the dismissal were found to be unfair only because no fair procedure was followed - the compensation which should be awarded should be equivalent to the remuneration the employee would have earned between the date of the dismissal and the date by when the outcome of the disciplinary hearing would have been known if a fair hearing had been held and the employee was still dismissed. In this regard he alluded to the fact that there are cases to that effect which were handed down under the Labour Relations Act, 1956 (Act No 28 of 1956) - including decisions of the Labour Appeal Court. Whatever its merits or demerits under the old Act, that approach no longer has a place under the new Act because of the specific provisions of sec 194(1). In this regard see what I said in CWIU v Johnson & Johnson [1997] 9 BLLR 1186 (LC) at 1208 C - 1221 H in relation to sec 194(1). Accordingly I decline to review and set aside the second respondent's award. In the premises the applicant's application is dismissed with costs.

R. M. M. ZONDO

Judge : Labour Court of S. A.

For the Applicant : Mr F. Rautenbach

Instructed by : Mallinicks Inc

For the First Respondent : Mr Van Wyk

Instructed by : Syfret Godlonton - FullerMoore Inc

No appearance for the Second Respondent

: 12 August 1998