IN THE LABOUR COURT OF SOUTH AFRICA

Held in Johannesburg

Case No.J874/97

In the matter between

Applicant

and

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

THE CHAIRPERSON OF THE GOVERNING
Sixth Respondent

JUDGEMENT

ZONDO J.

[1] In this matter the applicant applies for an order reviewing and setting aside an arbitration award which was issued by the first respondent, a CCMA commissioner, in favour of the third up to the fifth respondents in a dispute about the fairness or otherwise of their dismissal by the

applicant from its employ.

[2] Before I proceed I need to deal with one procedural matter. The case which the applicant pursued during argument was wider than the case which was foreshadowed in the applicant's founding affidavit in that some of the grounds on which the applicant sought to have this Court review and set aside the first respondent's award did not form part of the case covered by the founding affidavit. However, those grounds were included in a later supplementary affidavit filed on behalf of the applicant. The second, third, fourth and fifth respondents filed their own supplementary affidavit in answer thereto. The second up to the fifth respondents complain that, as such grounds of review were not included in the founding affidavit but only in a later supplementary affidavit, the Court should not permitt the applicant to pursue that part of its case which is covered by such grounds.

[3] While I agree with the second up to the fifth respondents that the proper affidavit to contain an applicant's case in motion proceedings is the founding affidavit, I am of the opinion that there are cases where an applicant may be allowed to pursue a case which is not covered by its founding affidavit provided (a) such case is covered in a subsequent affidavit (b)all other parties are given an opportunity to respond thereto and (c) either there is no prejudice to be suffered by the respondents or if there is prejudice to be suffered by the respondents, such prejudice as they may stand to suffer, can be cured by the

opportunity to respond thereto with or without an appropriate costs order. Whether or not the Court allows this is in the discretion of the Court. The Court is required to exercise such discretion judicially - with due regard to fairness to all parties. The Court would also need to be furnished with a sound explanation why the case which is sought to be pursued was not foreshadowed in the founding affidavit. The Court would consider this even before it considers other factors.

[4] In this case the applicant's reasons for not including those grounds of review in the founding affidavit and for only including them later in a supplementary affidavit are set out in the supplementary affidavit of the applicant. I do not propose detailing them here as they are clearly set out in the supplementary affidavit. I am satisfied that this is a proper case where the Court should allow the matter to be dealt with on the merits without excluding those grounds of review. To do otherwise would cause serious prejudice to the applicant whereas, by including them, the respondents are not prejudiced in any way as they have had the opportunity to file their answering affidavits thereto and have actually done so. I now turn to the factual backround to this matter.

[5] The dismissal occurred after disciplinary inquiries in which the third, fourth and fifth respondents were charged with assaulting one Mr Phillemon Limphoko during a strike on the 18th February 1997. The assault is alleged to have taken place outside a cafe which is in the

vicinity of the applicant's premises. Mr Limphoko was one of the temporary employees employed by the applicant during the strike.

[6] Following upon the disciplinary inquiries referd to earlier, the third, fourth and fifth respondents, (**"the employee respondents"**) were found guilty and were dismissed. Unhappy with this result, the employee respondents referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (**"the CCMA"**) for conciliation. When conciliation failed to produce a settlement of the dispute, the dispute was referred to arbitration. The first respondent was appointed as the arbitrator. After hearing evidence and reserving his award, the first respondent issued an award in terms of which he found the dismissal of the third, fourth and fifth respondents to have been unfair and ordered the applicant to reinstate them with retrospective effect to the date of their dismissal. It is this award that the applicant is asking this Court to review and set aside.

[7] The first ground on which the applicant seeks to have the first respondent's award reviewed and set aside is that the first respondent refused it legal representation when it applied at the commencement of the arbitration proceedings to be legally represented. It is common cause that the first respondent refused such application. What is not common cause is what occurred at the arbitration at the time of that application. Also certain statements which are attributed by the applicant to the first respondent at the time are in dispute.

[8] Part C of Chapter III of the Labour Relations Act, 1995 (Act 66 of 1995) (**"the Act"**)deals with the resolution of disputes under the auspices of the CCMA from sec 133 to sec 150 of the Act. Both sections 138(4) as well as sec 140(1) fall within Part C and they both say something about representation before the CCMA. The heading to sec 138 is: **"General provisions for arbitration proceedings".** The heading to sec 140 is : **"Special provisions for arbitration about dismissals for reasons related to conduct or capacity".**

[9] Sec 138(4) reads thus : **"In any arbitration proceedings, a party to the *dispute* may appear in person or be represented only by a *legal practitioner*, a co-employee or by a member, *office-bearer* or *official* of that party's *trade union* or *employers' organization* and, if the party is a juristic person, by a director or an *employee*".**

[10] sec 140(1) reads :

"(1) If the *dispute* being arbitrated is about the fairness of a *dismissal* and a party has alleged that the reason for the *dismissal* relates to the *employee's* conduct or capacity, the parties, despite section 138 (4), are not entitled to be represented by a *legal practitioner* in the arbitration proceedings unless-

(a) **the commissioner and all the other parties consent; or**

(b) **the commissioner concludes that it is unreasonable to expect a party to deal with the *dispute* without legal representation, after considering-**

(i) the nature of the questions of law raised by the *dispute*;

(ii) the complexity of the *dispute*;

(iii) the public interest; and

(iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the *dispute".*

[11] From a reading of sec 138(4) and sec 140(1), it seems that in arbitration proceedings before the CCMA other than in those arbitration proceedings which relate to disputes about dismissals for conduct or capacity, the norm is that there is a right to legal representation. However, in those arbitration proceedings relating to disputes about dismissal for conduct or capacity there is, as a general rule, no right to legal representation. In the latter case the right to legal representation exists only in two situations. The one situation is where not only all parties to the dispute consent to legal representation but

also the commissioner consents. That is the sec 140(1)(a) situation. The other situation is where, after considering the factors set out in sec 140(1)(b)(i) to (iv), the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation. That is the sec 140(1)(b) situation.

[12] In a case where the consent of all parties has not been given to one or more of their number to be represented by a legal practitioner in an arbitration of a dispute of a dismissal on grounds of conduct or capacity, for a party to acquire the right to be represented by a legal practitioner, it is essential that the commissioner must have first concluded that it would be unreasonable to expect the party to deal with the dispute without legal representation. If he/she does not come to this conclusion, no right to legal representation is acquired. If, however, the commissioner reaches such conclusion, the right to legal representation is acquired. Once the commissioner has reached that conclusion, he or she has no discretion - the party concerned becomes entitled to be represented by a legal practitioner in the arbitration proceedings. It is not a matter of discretion on the part of the commissioner at that stage.

[13] In my view the effect of sec 140(1) is therefore that, in a case to which sec 140(1)(b) applies, the central question is whether or not the commissioner is able to conclude that it would be unreasonable to expect the party seeking to be represented by a legal practitioner to deal with the dispute without legal representation. Accordingly, the

party applying for legal representation should seek to persuade the commissioner to conclude in its favour that to so expect would be unreasonable whereas the party, if any, opposing that the first mentioned party be legally represented should direct its arguments and evidence to showing that it would not be unreasonable to let the party concerned deal with the dispute without legal representation. In directing their focus to this issue, the parties must address the issues enumerated in sec 140(1)(b)(i)-(iv).

[14] In my view sec 140(1)(b) does not, therefore, envisage a situation where the issue whether it would be unreasonable to expect the party concerned to conduct the dispute without legal representation is simply a factor to be taken into account together with the matters enumerated in sec 140(1)(b)(i)-(iv). Rather that is the central question which the consideration of the matters stipulated in sec 140(1)(b)(i) to (iv) is directed at answering. The answer to that question is the one that determines whether the party seeking legal representation then becomes entitled to it or not. This reasoning is based on the specific wording of sec 140(1), especially the use of the negative therein coupled with the use of the word **"unless"**. When it is said a person is not entitled to X unless a certain event occurs, it necessarily means that, when that event occurs, he will be entitled to X. It does not mean that at that stage he may or may not be entitled to X. It is like an ultimatum to strikers which says to them : unless you return to work by X time, you will be dismissed. Such an ultimatum means that, if

workers return to work by X (and thereby comply with the ultimatum), they will not be dismissed. It does not mean that even if they comply with the ultimatum, they may or may not be dismissed. (See **Administrator, OFS & Others v Makoponele & Others 1990 (3) 780 (A)**). With the above in mind, I turn to consider the applicant's complaint about the first respondent's decision refusing it legal representation.

[15] The applicant's allegations relating to its complaint about its denial of legal representation are to be found in paragraphs 6.2 up to 6.7 of its supplementary affidavit. Its complaint is that, in refusing it legal representation, the first respondent did so without considering the factors set out in sec 140(b)(i)-(iv), that, without considering the application for legal representation, the first respondent said legal representation was automatically precluded, that, having looked at sec 140 after being given a copy of the Act by the applicant's representative, the first respondent immediately said he was refusing legal representation and that he refused the application for legal representation without inquiring whether the representative of the employees had an objection to such application.

[16] There is a factual dispute on the papers about the allegations the applicant relies upon in this regard. The employee respondents deny that the first respondent ever said legal representation was automatically precluded. They also deny the allegation that a copy of

the Act was shown to the first respondent by a representative of the applicant. They also deny that the first respondent ever said, after looking at sec 140 from a copy of the Act provided to him by the applicant's representative, that he was refusing legal representation. The respondents say that the first respondent called for argument on the applicant's request for legal representation and that the representative of the second up to the fifth respondents did object to the application and argued that, as he, (i.e. the representative of the employees), was not legally qualified, the applicant should not be granted legal representation. No request was made for the matter to be referred to oral evidence to resolve these or any other disputes of fact.

[17] The applicant has submitted that these disputes of fact on this issue must be resolved in its favour in the absence of an affidavit by the first respondent and in the light of the first respondent's failure to furnish reasons for his decision refusing the applicant's application for legal representation. As to what the applicant alleges the first respondent to have said in regard to its application for legal representation, one would have thought that the first respondent would have filed an affidavit to deal with the applicant's allegations in this regard because they are of a serious nature. He has not done so. However, the fact that he has not filed an affidavit does not on its own entitle the applicant to have its version accepted. I say this because the second up to the fifth respondents were present at the arbitration at the time and they deny that the first respondent made the statements attributed to him by the

applicant.

[18] The one allegation by the applicant which I initially thought must be accepted in the absence of an affidavit by the first respondent and despite a denial thereof by the second up to the fifth respondents is the allegation that the first respondent did not consider the application or that he did not consider the matters set out in sec 140(1)(b)(i)-(iv). I thought whether or not the first respondent considered the application or the matters set out in sec 140(1)(b)(i)-(iv) could only be within the knowledge of the first respondent. I thought any other person, e.g. the second up to the fifth respondents, could only infer that the first respondent had done so if he had given reasons therefor. As he had neither said so nor given reasons for his decision, I thought a denial by the second and further respondents of the allegation by the applicant that the first respondent had made the decision without considering the application or without considering the matters set out in sec 140(1)(b)(i)-(iv) did not and could not raise a genuine dispute of fact. I thought such a denial could only be based on speculation. I thought, if that allegation stood uncontroverted, then the first respondent had committed a gross irregularity in refusing such application without considering it or without considering the matters set out in sec 140(1)(b)(i)-(iv).

[19] However, I later changed my mind on this when, going through the affidavits again, I came across what the applicant says in paragraph

11.2 of its supplementary affidavit. There the applicant in effect says, although initially the first respondent refused legal representation on the basis that legal representation was automatically precluded, the first respondent had subsequently accepted an invitation by the applicant's representative to peruse the relevant provisions of the Act. Then the deponent to the applicant's supplementary affidavit says the first respondent **"did then consider the factors listed in section 140(1) ..."** The effect of this is that the Court's decision on this complaint must be taken on the basis that the first respondent considered the matters set out in sec 140(1) and came to the conclusion that legal representation should be refused. Therefore, on the applicant's own version, the first respondent did consider the application and the matters set out in sec 140(1)(b) of the Act. In the light of this, the only question would be whether or not the first respondent's decision on the merits of the application is reviewable.

[20] I have already found above that a party who applies for legal representation in terms of sec 140(1)(b) of the Act must seek to pursuade the commissioner to conclude that it would be unreasonable for the commissioner to expect such a party to deal with the dispute without legal representation. Such a party must seek to do this with reference to the matters set out in sec 140(1)(b)(i)-(iv). There is nothing before me which suggests that the applicant had made out a case to that effect before the first respondent. The second up to the fifth respondents have said that it was argued on their behalf that, as

their representative was not a legal practitioner, the first respondent should not permit legal representation for the applicant.

[21] As to the matters set out in sec 140(1)(b)(i) to (iv) of the Act, the following emerges from the papers :

(a)There is nothing in the papers to suggest that the applicant ever told the first respondent what questions of law arose in the dispute;

(b)There is nothing before me to suggest that the first respondent was ever told on what basis it could be said that this dispute was complex; in fact this was a very simple dispute - largely dependent on facts - whether the third up to the fifth respondents were the people who had assaulted Mr Limphoko.

(c)It was never argued before the first respondent nor was it argued before me that there was any public interest in this matter; in fact there is no public interest in this matter at all.

(d)It was not argued before the first respondent, nor was it argued before me, that the comparative abilities of the opposing parties or their representatives were such that, comparatively speaking, the representative of the employees at the arbitration was stronger than the two representatives of the applicant and that the denial of legal representation to the applicant would place the applicant in a

disadvantageous position vis-a-vis the representative of the employee respondents. In all fairness no such argument could be presented as the applicant's representatives were an industrial relations manager and an industrial relations adviser. The employee respondents were represented by a union official.

[22] Bearing the above in mind, it seems quite clear to me that, even though the first respondent did not give reasons for his ruling, the application could simply not succeed in the light of the glaring weaknesses in the applicant's case for legal representation as outlined above. Even if I were to rule that the first respondent had committed a gross irregularity in refusing the application without considering the matters set out in sec 140(1)(b), I would have refused the application on considering it on the merits. I am saying this because the applicant requested that I should consider its request for legal representation and decide it myself if I set aside the first respondent's decision not to allow legal representation

[23] The question that still remains then in relation to the first respondent's ruling on legal representation is what I must make of the fact that the first respondent has not furnished reasons for his ruling despite the fact that he was obliged to give reasons for such a ruling. That he was so obliged can simply not be in dispute in the light of the provisions of sec 138(7) of the Act as well as the provisions of article 33(1) and (2) of the constitution. Sec 33(1) says everyone has the right to

administrative action that is lawful, reasonable and procedurally fair. In terms of article 33(2) says : **"Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons"**. See also paragraph 15-21 of the as yet unreported judgement of the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus N.O. & Others case No JA 52/98.**

[24] Does the failure of the first respondent to give reasons for his ruling on legal representation have the effect that on that ground alone his ruling must be reviewed and set aside? Neither the constitution nor the Act says what the consequences or effects are of a public official's or body's failure to give reasons for his or its decision where it is obliged to give reasons. One approach would be to say such a failure automatically means that the ruling must not be allowed to stand and must be reviewed and set aside. That approach would have the following as its advantages **:**

(a)it would deter public officials from not giving reasons for their decisions or their rulings because they would know that such failure would render their decisions or rulings reviewable;

(b)it would encourage the giving of reasons for decisions and rulings which in turn may reduce the number of rulings or decisions which get challenged in Court;

(c) it would promote accountability**,** openness and responsiveness that

the Labour Appeal Court referred to in par 19 of the **Carephone** judgement as being the purpose of the administrative justice section of the Bill of Rights.

[25] The disadvantages of adopting such an approach would be that :-

(a)a decision which deserves to be allowed to stand if one has regard to the material that was before the commissioner when he/she made such a decision would be set aside merely because the commissioner failed to give reasons - even if he or she could have given good reasons if he or she had bothered to give reasons. This could well penalise the innocent party to the dispute.

(b) it may unduly delay finality in litigation and contribute to the already high litigation costs.

(c)it may encourage formalism and technicality at the expense of substance.

(d)it would unduly encourage litigation in respect of matters which could well have never been brought to court.

[26] Another approach would be to say that, ordinarily, the remedy to deal with a failure by a public official to give reasons for his/her decision or ruling is to approach a court of competent jurisdiction for an order

compelling such official to give reasons for his or her decision or ruling and to say that, therefore, there is no reason why that remedy cannot be said to be capable of ensuring accountability, openness and responsiveness. Such an approach may also ensure that a decision without reasons will not last. This approach would then say that there is no justification, when another route is available to ensure that reasons are given, to resort to the extreme measure of setting aside a decision which may well be correct simply because the official has failed to give reasons for the decision or ruling.

[27] Another approach would be that the Court must never set aside a decision simply because no reasons have been given for it and that, at least, the Court should take the failure of the official to give reasons as one of a number of factors relevant to the question whether or not an adverse inference should be drawn from the official's failure to furnish reasons. Another approach would be to say that the court has a discretion as to what role an official's failure to give reasons for a ruling must play when the Court considers the question whether or not such a ruling must be reviewed and set aside.

[28] I prefer the approach that there should be no fixed and rigid rule of what role should be played by an official's failure to give reasons for his ruling or decision when a court considers an application to review and set aside such a ruling or decision. Each case must be considered in the light of its own circumstances. The court should not be quick to

set aside a decision simply because no reasons have been given for it. There may, however, be room for the court to review and set aside such a decision where, apart from the fact that no reasons have been given for it, the court thinks that, having regard to the material that was before the official, it was more likely that no good reasons can be found for such a ruling than that there are such reasons which can possibly be advanced. There may be a case where, if the court has regard to the material that was before the official, the court is able to say there exists one or more reasons which justify the view that such decision should be allowed to stand. In that case I cannot see why such a decision should be set aside; in fact there is every reason why it should stand despite the fact that the public official concerned did not give reasons for it. What weight, if any, the court gives to the public official's failure to give reasons must be left to the court to be dealt with in the light of the particurlar case before the court and bearing in mind the purpose of sec 33(1) read with (2) of the Constitution.

[29] In this case the matter must be decided on the basis that, before the first respondent decided the issue of legal representation, his attention was drawn to the matters set out in sec 140(1) of the Act, that he invited argument and he considered those matters and then decided that the applicant would not be permitted to be represented by a legal practitioner. In the result I conclude that there is no basis for setting aside the first respondent's ruling on legal representation or the award on their basis advanced.

[30] The second ground on which the first respondent's award was attacked is that the applicant's representatives at the arbitration hearings **"formed the impression that the arbitrator lacked impartiality".** It was submitted that the test propounded in **BTR Industries South Africa (Pty) Ltd & Others v MAWU & Another 1992 (3) SA 673 (A) at 693 I-J** and **Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at 8H-I** had been satisfied in this case

[31] As stated in the cases referred to above, the test for bias is the existence of a reasonable suspicion of bias. The question therefore is whether, on the facts on which the applicant relies, it can be said that the applicant's representatives at the arbitration proceedings developed a reasonable suspicion of bias on the part of the first respondent. The suspicion of bias or partiality must be one which might reasonably have been entertained by a lay litigant in the circumstances of the applicant. If such a suspicion could reasonably have been apprehended, the test of disqualifying bias is satisfied. It is not necessary to show that the apprehension is that of a real likelihood that the first respondent would be biased or was biased.

[32] At this stage it is appropriate to have regard to the facts which the applicant relies upon to say the test of disqualifying bias was satisfied in this case. In approaching such facts the court has to bear in mind

that, in case there is a dispute of fact in relation to what occurred or was said in the arbitration proceedings, the court must rely on the respondents' version unless the respondents' version is quite clearly untenable or inherently improbable.

[33] The allegations of fact on which the applicant relies in relation to this ground of complaint are to be found in paragraphs 11.1 up to 11.7 (inclusive) of the applicant's supplementary affidavit. In par 11.1 the applicant says the manner in which the first respondent dealt with the applicant's application for legal representation as well as the manner in which he reached his decision on its application for legal representation gave the applicant the impression that he lacked impartiality. When in par 11.1 the applicant refers to the manner in which the first respondent dealt with its application and the manner in which he reached his decision, it can only be referring to its allegations in paragraphs 6.2, 6.3, 6.5, 6.6, 6.7 and 6.8. of its supplementary affidavit. The second to fifth respondents' answers to those allegations are to be found in their answer at paragraphs 23 to 28 (inclusive). Essentially the allegations which could possibly be relied upon by the applicant to show grounds for reasonable suspicion of bias are placed in dispute. There would be no basis for saying the respondents' version on those allegations is clearly untenable or inherently improbable so as to justify not relying on the respondents' version.

[34] Both the allegation that the first respondent said that legal representation was automatically precluded under the Act and the allegation that, after considering the factors set out in sec 140(1), the first respondent immediately refused legal representation without even making enquiries about the attitude of the employee respondents' representative to such application have been denied by the respondents. The second up to the fifth respondents say the first respondent called for argument on the issue and argument was presented. That is the version which the court must rely upon in regard to this part of the case. I have considered the applicant's version in all the paragraphs it relies upon in support of its contention that there was a reasonable suspicion of bias and, in the light of the respondents' denials and version on the happenings at the arbitration, I conclude that the test for disqualifying bias has not been satisfied. Accordingly the court cannot uphold the applicant's contention in this regard.

[35] A further ground on which the applicant attacked the first respondent's award was that the first respondent excluded certain evidence which the applicant wanted to lead at the arbitration. It says that such conduct on the part of the first respondent constituted a gross irregularity in the proceedings justifying the setting aside of the award. The evidence which the applicant says was excluded relates to a video footage as well as the evidence of certain witnesses. I begin with the exclusion of the video footage evidence. The fifth respondent denied under cross-examination that he had been at the gate of the applicant with other

strikers on the 17th February 1997. The 17th February was the day before the day of the assault on Mr Limphoko. The issue before the first respondent was whether it was the third to the fifth respondents who had assaulted Mr Limphoko on the 18th February 1997. The reason why the applicant sought to lead such video footage evidence was that such evidence was going to show that, contrary to the fifth respondent's evidence, he was present at the applicant's gate on the 17th February. The applicant believed that such evidence was relevant to the issue of the fifth respondent's credibility because the latter had testified that he was not there. The first respondent refused to allow the applicant's representative to lead such video footage evidence to contradict the fifth respondent's answer that he was not at the gate of the applicant's premises on the 17th February 1997. The first respondent did not give his reasons for this ruling in his award. However, a reading of the transcript on this issue makes it crystal clear that he regarded it as irrelevant.

[36] The applicant's complaint in this court on this issue is that the first respondent's ruling was such as to prevent the applicant's case from being fairly determined. The second to the fifth respondents dispute this and contend that the first respondent was right in regarding such evidence as irrelevant.

[37] In the course of consideration of my judgement in this matter and particularly on this issue, it occurred that there might be room for

argument that whether or not the fifth respondent was present at the gate with other strikers on the day preceding the day of the assault could well be said to be a collateral issue which was only relevant to the credibility of the fifth respondent as a witness in which case the rule that a witness' answer on such an issue when he is cross-examined is final and may not be contradicted could be applicable. I therefore invited argument on this from both Counsel as this had not been argued at the hearing of the matter.

[38] Counsel subsequently submitted their argument by way of supplementary heads of argument. Mr Franklin stands by his submission that the evidence in question was relevant to the issue whether the fifth respondent was present at the applicant's gate on the 18th February and thereafter at the scene of the assault.

[39] Mr Franklin's argument is that, if it can be shown that the fifth respondent was **"dishonestly denying his presence at the premises on the 17th February . . the inference could properly be drawn that he was lying too about his absence from the premises on 18th February . ."** . Mr Franklin adds that this must be seen against the background that Mr Limphoko had given evidence to the effect that he had been assaulted on the 17th February as well. I have gone back to the transcript of Mr Limphoko's evidence and I do not think that he gave such evidence. What Mr Limphoko appears to have said is that some worker had approached him on the 17th February and, after

telling him to keep the truck he was using clean, stated that he did not think that Mr Limphoko would **"get far"** with that truck and that trucks should stay in the yard and not go out.

[40] The first question is whether or not evidence tending to show that the fifth respondent was present at the applicant's gate on the 17th February is relevant to the issue the first respondent was called upon to decide. In **R v Katz 1946 AD 71** at **78** Watermeyer CJ had the following to say on the word **"relevant : "The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other".**

[41] Initially I did not think that that the fifth respondent was present at the gate on the 17th February, assuming that he was, would, either taken by itself or taken in conjunction with any other facts in the case, either prove that the fifth respondent must also have been at the gate on the 18th February nor did I think that it would have made it more probable that he was. However, after considering the issue carefully, I have come to the conclusion that it is relevant to the issue the first respondent was called upon to decide in relation to the fifth respondent. The basis for its relevance is par 8.2 of the applicant's supplementary affidavit and fifth respondent's answer thereto. In par 8.2 the applicant says the fifth respondent's evidence was that he was

not at the applicant's gate on both the 17th and 18th February and the reson why he was not there was that he took ill **"on the 17 and 18 February".** The respondents admit this paragraph in their answer to par 8.2. This means that the reason for the fifth respondent's absence for both the 17th and 18th is one and the same reason, namely, that he was sick on those two days. If, therefore, the applicant's video footage evidence were to show that the fifth respondent was at the gate on the 17th February, that evidence would go to the very heart of the fifth respondent's defence. Let us assume that in the video the fifth respondent is shown singing at the top of his voice and engaged very actively in toi-toying. It seems to me that, in those circumstances, it would be difficult to accept his evidence that he was ill on the 17th and, therefore, on the 18th as well; in fact not much would be left of his defence. I therefore conclude that the video footage evidence the applicant wanted to lead was relevant in so far as the fifth respondent was concerned. Accordingly the first respondent's decision in not allowing it constituted a gross irregularity in regard to the case against the fifth respondent or precluded the applicant's case from being fully and fairly determined.

[42] The other exclusion of evidence which the applicant complains about is that the fourth respondent was not allowed by the first respondent to call five witnesses whom he wanted to call to corroborate his version that he was at home on the day of the alleged assault. The applicant's complaint is that by reason of the fourth respondent not

being allowed to call these witnesses, it (i.e. the applicant)was prevented from cross-examining them and, therefore, it was prevented from having its case fully and fairly determined. This complaint has no merit. If anybody has a right to complain about being prevented from having his case fully and fairly determined, that would have been the fourth respondent. Not the applicant. In fact the applicant should be happy that such witnesses were not called because, for all we know, there is no basis for saying if they had been called, they would not have said what the fourth respondent hoped they would say. At any rate the applicant was free at any stage to seek particulars of such witnesses and call them as its witnesses if it thought their evidence would assist its case. It did not take any steps to secure them. Accordingly I am of the view that in so far as the first respondent's not allowing the fourth respondent to call such witnesses may have been an irregularity, it is not an irregularity that prejudiced the applicant. A party which relies on an irregularity to seek a review must show that such irregularity was prejudicial to itself. A Court cannot interfere in proceedings of a tribunal such as the CCMA on the grounds of an irregularity which is only of academic interest.

[43] The other complaint by the applicant is that the first respondent refused to admit minutes of the disciplinary and the appeal hearing with which the applicant sought to demonstrate that there was inconsistency between the evidence given in the disciplinary inquiry by the third respondent and the evidence he was giving at the

arbitration. The first respondent stated that it was not necessary to listen to the tapes relating to the disciplinary inquiryand the appeal. The applicant wanted to demonstrate inconsistency in the version of the third respondent given at the disciplinary inquiry and the version given at the arbitration. The first respondent said the minutes or tapes were not material. In this regard I am of the opinion that the first respondent commited a gross irregularity or made a ruling which precluded the applicant's case from being fairly determined. This was a case where the issue of credibility was going to play an important role and, if the applicant sought to introduce evidence that was going to show that the respondents were giving versions which were different from those they had given at the disciplinary inquiry, such evidence should have been admitted - provided, of course, that the applicant went about introducing it in a manner acceptable in law unless the first respondent relaxed procedural requirements for its admission in the exercise of his powers under sec 138(1) of the Act.

[44] I think the case about whether or not the third, fourth and fifth respondents assaulted Mr Limphoko is, in the light of their defences as well as their evidence, of such a nature that fairness dictates that, bearing in mind the nature of the gross irregularities committed, the entire proceedings should be set aside rather than that the award should be set aside in so far as it may relate to one or other of the employee respondents. In those circumstances the order I make is the following :-

(1)The arbitration award issued by the first respondent in the dismissal dispute between the applicant and the second upto the fifth respondents is hereby reviewed and set aside.

(2)The dismissal dispute referred to in (1) above is hereby remitted to the CCMA to be arbitrated by a Commissioner other than the first respondent.

(3)The second, third, Fourth and fifth respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.

R. M. M. ZONDO
Judge of the Labour Court of South Africa

: 30 September 1998
: 09 February 1999
: Mr A. Franklin
: Webber Wentzel Bowens
espondents : Mrs E. Menell
: Mlambo & Modise Attorneys