IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D231/98

In the matter between

MONDI KRAFT (PTY) LIMITED	**Applicant**
and	
PAPER, PRINTING, WOOD AND ALLIED WORKERS UNION	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
S J NGWENYA N.O.	**Third Respondent**
ENOCK MWELASE	**Fourth Respondent**

JUDGMENT

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de VILLIERS A J

1. This is an application in terms of section 145 of the Labour Relations Act of 1995 to have the award of the Third Respondent ("the Senior Commissioner") under Commission for Conciliation, Mediation and Arbitration ("the CCMA") Case Number KN9274 dated 19 February 1998 set aside.

2. In the award, the Senior Commissioner found that the dismissal of the

Fourth Respondent ("the employee") by the Applicant was unfair and reinstated him in his employment with the Applicant.

3. The application was opposed only by the First and Fourth Respondents ("the Respondents").

4. The Respondents and the Applicants failed to comply with time limits imposed by the rules of this Court for the delivery of a Notice of Opposition and Answering Affidavit and a Replying Affidavit respectively. At the hearing, the parties agreed not to take issue with each other in this regard and therefore the Court considered it expedient to condone the non-compliance in order to expedite the hearing of the application.

5. The essence of the Applicant's case is that:

5.1. the Senior Commissioner's findings relative to the procedural fairness of the dismissal was not supported by evidence presented at the arbitration and the finding itself is not justifiable or rational; and

5.1. the Senior Commissioner's finding that the sanction of dismissal was "harsh" is not supported by reasons in the award and is, in any event, not justifiable or rational.

6. It is common cause that, despite the Applicant's compliance with the Rule, effective at the time when the application was launched, calling upon the Commission and the Senior Commissioner to provide the written record of the proceedings and to provide further reasons for the making of the award, should they so wish, the Commission and the Senior

Commissioner have failed to do so.

7. The Respondent argued, *inter alia*, that because the decision whether the award was justifiable or rational in terms of the test laid down by the Labour Appeal Court in **Carephone (Pty) Limited v Marcus N.O. and others** [1998] 11 BLLR 1093 LAC can only properly be made made on the totality of evidence before an arbitrator, an application for review on this basis is fatally defective where the entire record of the arbitration proceedings is not placed before the reviewing court.

8. The court does not entirely accept this argument. The mere failure to provide a verbatim record of the proceedings has not prevented this Court from exercising its powers of review in terms of the provisions of section 145 in appropriate circumstances. As Landman J points out in **County Fair v CCMA & Others** [1998] 6 BLLR 577 LC at 583B :

"…where there has been no mechanical transcribing of the proceedings, the applicant in a review is obliged to reconstruct the record insofar as it may be necessary to advance his or her case and to give the court of review a fair picture of what transpired before the arbitrator……."

9. Where there is a conflict between the versions of the Applicant and Respondent, the Court will prefer the version of the Respondent unless the Senior Commissioner's notes or his award are conclusive of the issue. (**County Fair** supra at 583 C-D)

10. There may well be instances where the Court is unable to make a finding without a full record of the proceedings. But where a defect as defined in section 145 is obvious from the award and the admitted facts

before it, and if, from the award and the admitted facts, the Court is satisfied that it has before it all material evidence relative to a particular point and is thus able to make a finding that there is no rational objective basis justifying the connection made by the arbitrator between **that** material and the conclusion he or she eventually arrived at on that point, the Court is placed in a position to set aside the award despite the absence of the entire record.

11. In this case the Senior Commissioner makes a finding that the "procedural irregularity" occurred only in relation to the appeal hearing, having found that the disciplinary enquiry was procedurally fair. It is clear from the award and the admitted facts on the papers that this finding is based only on the written report of the person who chaired the appeal which was read into the record at the arbitration hearing because the appeal chairperson was not available to give *vive voce* evidence at the time.

12. The material section of the award reads as follows:

"The chairman of appeal turned down the appeal on the grounds that the respondent has bent over backwards in accommodating the applicant. This is what he had to say in his opening remarks.
'In order for me to get a feeling of what direction I should take in this case I looked at this man's history. In fact, not only did I go back as far as his first warning which I have on record, I went back earlier the year (sic) to find out whether this man was going through a particularly bad time in his life, which may have resulted in these instances or whether there was some other pattern'
He then goes further and catalogue (sic) a list of the applicant's absence or late notification of his absence."

13. From this, and this alone, the Senior Commissioner makes the following factual findings:

13.1. “when the [employee] appeared before the appeal enquiry he had not been apprised that he would be confronted with his whole past’;

13.2. “[H]e was thus taken by surprise;

13.3. “…when the [employee] appealed, he expected the chairman to deal with the incident for which he was dismissed;

13.4. “the chairman on appeal was influenced by factors which were not properly before him and of which the applicant did not have the opportunity to contest”.

14. It is noteworthy that the Respondents, at paragraph 22 of their Answering Affidavit, admit the contents of paragraph 29 of the Applicants Founding Affidavit which includes an assertion by the Applicant that the Senior Commissioner made these findings in the absence of evidence to support them.

15. From this evidence, too, the Senior Commissioner imputes a sinister motive to the appeal chairman’s enquiry into the employee’s prior record when an ordinary reading of this passage and the report itself indicates that the appeal chairman was trying to find a way to show leniency - that his motive for delving into the employee’s past was to establish whether there were factors indicating that the employee’s current absences were an aberration from previous behaviour – whether he was going through a “bad time in his life” which could justify the absences for which he was dismissed and hence give the appeal chairperson a reason for overturning the decision taken at the disciplinary enquiry.

16. In the light of the aforegoing and in the absence of any response from the Commission or the Senior Commissioner to the allegation that he made material findings of fact in the absence of evidence, the Court can only conclude that the Senior Commissioner's findings listed above are not only not rational or justified because there was no evidence to support them but there is no rational connection between the wording of the report and the conclusions reached by the Senior Commissioner that the appeal was procedurally flawed. His finding that the chairman on appeal was "influenced by factors which were not properly before him and of which the applicant did not have the opportunity to contest" is particularly unjustifiable since it is common cause that the employee was present at the appeal and chose not to give evidence or participate therein.

17. In addition, his finding that "[T]he record of appeal shows incidents which no doubt in my mind could have justified a harsher sanction" makes no sense in circumstances such as this. What the Senior Commissioner does not appear to appreciate is that the employee had already been dismissed and there is no harsher sanction than that.

18. The Senior Commissioner also concludes that "the sanction was harsh in the first instance" without giving any reasons in the award or otherwise as to why he comes to this conclusion. Not only does section 138 (7) (a) of the Act compel the Senior Commissioner, at the very least, to provide **brief** reasons for coming to this conclusion, but there is also a constitutional imperative (section 23 (2) of the Constitution) requiring written reasons to be furnished. The Senior Commissioner's failure to do so constitutes a gross irregularity.

19. For all these reasons, the award is set aside.

20. If an award is set aside, the Court is given a discretion in terms of section 145 (4) either to determine the dispute in a manner it deems appropriate or to make an order it considers appropriate about the procedures to be followed to determine the dispute.

21. The Applicants have asked for the Court to substitute a finding that the dismissal was fair.

22. If one accepts, as the Senior Commissioner does, that the disciplinary enquiry was conducted in accordance with a fair procedure and, as the Court does, that the Senior Commissioner's finding with regard to the procedural irregularities relative to the appeal hearing are not justifiable, there is no reason why the Court should not substitute a finding that the dismissal of the Fourth Respondent was procedurally fair.

23. However, the substitution of a finding relative to the fairness or otherwise of the sanction is another matter.

24. While the Applicant has gone as far as it can to provide the Court with a fair picture of the evidence presented at the arbitration, the failure by the Senior Commissioner to provide written reasons for his bald assertion that the sanction was "harsh in the first instance", tacked on almost gratuitously, cannot in and of itself, justify a mere reversal of the decision reached where there are no reasons given for it in the absence of a full record of the proceedings before the Court from which mitigating and aggravating factors can be properly assessed.

25. Although the Court could attempt to make a decision based on the

award itself and the admitted facts on the papers, it is reluctant to do so as there may be other factors which were before the Senior Commissioner which could have had a bearing on this aspect. For example, the employee's length of service and the employee's argument at the arbitration that the charges relating to the offences committed on 29 March and 1 April 1997 should have been treated as one, together with the fact (as noted in the award) that the employee's supervisor appeared easily able to find a replacement for the employee on one of the days when he was absent, may, in the opinion of the Senior Commissioner, have constituted strong mitigating factors justifying his finding that the sanction was "harsh".

26. The mere substitution of one finding for another is not something which can be appropriately determined on a **selection** of the evidence led at the arbitration. In making a substitution, the Court must be certain that it has all the material evidence which was before the arbitrator which may have had a bearing on the issue is being called upon to determine. The failure of the Senior Commissioner to include the reasons in his finding does not necessarily mean that there were no reasons. The Court has no alternative, therefore, but to refer the matter back for a hearing only as to whether the sanction of dismissal is appropriate.

26.1 I therefore make the following order.

26.2. The award of the Third Respondent dated 19 February 1998 under case number KN 9274 is set aside.

26.3. The dismissal of the Fourth Respondent was procedurally fair.

26.4. The dispute is remitted back to the Second Respondent for hearing by a commissioner other than the Third Respondent for a determination only as to whether dismissal, in the circumstances of this case, is an appropriate sanction and for an appropriate order in terms of section 192 of the Act.

26.5. The First and Fourth Respondents are to pay the Applicant's costs jointly and severally, the one paying the other to be absolved.

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I de VILLIERS A J
Acting Judge of the Labour Court

Date of Hearing : 6 May 1999

Date of judgment : 14 June 1999

For the applicant : Advocate L C A Winchester
instructed by Shepstone & Wylie

For the First and Fourth respondents : Advocate P Schumann
instructed by Chennells, Albertyn and Tanner