IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J1014/00**

In the matter between:

ROPE CONSTRUCTIONS COMPANY (PTY) LTD Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

M PHALA Second Respondent

WESLEY J MULLER Third Respondent

JUDGMENT

JAMMY AJ

This is an application for an order reviewing, correcting and setting aside the award made by the Second Respondent on 23 February 2000 in his capacity as a Commissioner of the First Respondent and in which he determined that the dismissal of the Third Respondent was procedurally unfair and awarded him compensation equivalent to six month's salary calculated at a monthly rate of R4 465,00. Concomitantly the Applicant seeks a declarator to the effect that the Third Respondent's dismissal was procedurally fair.

In a cross-application under the same case number, an order is sought by the Third Respondent (the Applicant in reconvention) the effect of which would be to substitute the compensation order made by the Second Respondent by an order for the payment of compensation in an amount equivalent to twelve month's salary, calculated at a monthly income of R7 158,82.

The Second Respondent's determination that the dismissal of the Third Respondent was substantively fair, is not challenged in these proceedings and the logical development of this judgment dictates that I should deal first with the application for the review of the finding of procedural unfairness.

That determination, made by the Second Respondent in his award "without hesitation", is sourced in an analysis of evidence presented, and submissions made, to him which may be summarised as follows:

i) The charges against the Third Respondent were brought a year after the incidents to which they related occurred. Citing

Union of Municipal Workers and Another v Stadsraad van Pretoria (1992) 13ILJ 1563(IC)

the Second Respondent commented that

"It is trite that a hearing should follow as soon as possible after the incident which led to the disciplinary action so that the facts are still fresh in the minds of the parties and the witnesses. Another reason why disciplinary hearings should be held expeditiously, is that otherwise the employer may be deemed to have waived its right to dismiss for the charge alleged."

ii) The chairperson of the disciplinary enquiry was, moreover, biased. The decision to dismiss the Third Respondent was taken two weeks before the hearing and the cheque handed to him, before the verdict was handed down, was prepared during a 15 minute recess.

iii) The chairman of the disciplinary enquiry to which the Third Respondent was subjected was Mr R B Stockl. The senior manager of the department in which the Third

Respondent was employed was his son, Mr R J Stockl who acted, according to the disciplinary enquiry minute, as "accuser". A certain Mr D H Fourie, described as the "scribe" appears from the minute also to have taken an active part in the disciplinary proceedings and in support of the company's contentions. In the course of the arbitration hearing, Mr Fourie testified that he, Mr Stockl Jnr and the chairman Mr Stock Snr had "caucused" before the decision to dismiss the Third Respondent was formally handed down. In that regard, the Second Respondent records –

"The whole point of a disciplinary hearing is to enable the presiding officer to way up the evidence for and against the employee and make an informed and considered decision. This presupposes that he should have, and keep, an open mind. The rule against bias, of course, is less suited to small enterprises where the employer cannot avoid the fact of what is known as 'institutional bias'. However the employer should be careful to ensure that the hearing is in such a way as to place him above suspicion of actual partiality".

iv) An employee of the company, a certain Ms Chambers testified that, two weeks before the disciplinary hearing, she and the chairman, Mr Stockl Snr had discussed the fact that the Third Respondent was looking for another job. This fact was referred to specifically by the chairman before announcing the Third Respondent's dismissal. The disciplinary enquiry minute records that at the resumption of the enquiry after the fifteen minute adjournment during which the "caucus" apparently occurred, -

"… the chairman said that, in view of what was heard, and because Mr Muller was in fact looking for another job, there was no point in keeping Mr Muller here any longer and that it was better for all to terminate his employment forthwith. The chairman handed Mr Muller an envelope containing what was due to him from the company".

v) That envelope contained a cheque which, the Second Respondent records, was prepared on the Respondent's version, 15 minutes before the hearing resumed. At this stage the chairperson had not yet given his verdict.

"All these factors", the Second Respondent concludes, - "… Ms Chamber's testimony and Mr Fourie's statement, points to the fact that there was indeed bias", rendering the Third Respondent's dismissal procedurally unfair.

That determination, the Applicant contends, is not justifiable in relation to the reasons given for it. There is no rational objective basis justifying the connection made by the Second Respondent between the material and evidence properly made available to him and the conclusion at which he eventually arrived to the effect that the Third Respondent's dismissal was procedurally unfair, it is submitted.

Support for that contention is sought in the course of the Applicant's founding affidavit, in an exhaustive examination of the evidence presented in the arbitration and is summarised in heads of argument submitted by its counsel. The fact that Ms Chambers testified that she and the chairman had, two weeks before the hearing, discussed the fact that the Third Respondent was looking for another job cannot constitute bias where the charges against the Third Respondent are acts of misconduct and incompatibility. Nor, it is submitted without further elaboration, can the fact that a cheque was handed to the Third Respondent during an interval of the disciplinary hearing but before the chairperson had given his results, legitimately bear upon that conclusion. Reference is made to the atmosphere of acrimony in which the disciplinary hearing was conducted and which, it is contended, was attributed directly to the conduct of the Third Respondent. That in itself, it is suggested, "does not render the manner in which the services of the Third Respondent came to be terminated by the chairman of the enquiry as improper or motivated by malice and/or bias towards the Third Respondent … The facts of the present case are not such as to create an apprehension of bias which is reasonable".

Further analysis is then made, with reference to appropriate authorities, of the progressive erosion of the trust relationship between the Applicant and the Third Respondent. What relevance that has to the issue of procedural fairness, save perhaps in relation to the sanction ultimately imposed, is not apparent. Reference is then made to the fact that the Third Respondent was given a robust opportunity to present his version and cross-examine the Applicant's witnesses and, in that context, was granted a fair hearing. Once again, that contention does not appear from the papers to be in

dispute, the elements of procedural irregularity being premised by the Second Respondent on unrelated issues.

Emphasis is further laid on the generally accepted principle that procedures followed in a domestic internal enquiry are not necessarily required to meet the procedural formalities "of a formal tribunal or court of law", provided, it submits, that "the principal tenets of natural justice" are satisfied.

. Finally, in the face of what is referred to as the Third Respondent's "disruptive, abrasive, loud and rude" conduct throughout the proceedings which in itself was manifest evidence of the complaint against the Third Respondent with regard to his incompatibility with continued employment", it cannot be inferred, the applicant submits, that the chairman Mr Stockl Snr was biased. Once again I have difficulty in discerning the rational connection between this concluding statement and the allegations of fact purportedly supporting it.

. The Labour Appeal Court decision in

Shoprite Checkers (Pty) Ltd v A Ramdaw N O and Others (2001) 22ILJ 1603

has finally determined, following a period of uncertainty in that regard, that, as was decided by that court in

Carephone (Pty) Ltd v Marcus N O and Others (1998) 19ILJ 1425

awards made by commissioners under the auspices of the First Respondent, "can be reviewed and set aside if they are not justifiable in relation to the reasons given for them".

. That definitive determination however, does not assist in ameliorating the difficulty so frequently faced by this court, and alluded to by Nicholson J A in

in dealing with what the learned Judge referred to as the "blurred" distinction between appeal and review. That issue was developed by Zondo J P in ***Shoperite Checkers (Pty) Ltd*** *(supra)* at page 1631, where the following is stated

"In considering whether or not the First Respondent's award falls to be set aside on the ground that it is not justifiable in relation to the reasons given for it, I consider that one must have regard to the material that was properly available to the First Respondent, the decision he took and the reasons that he gave for such decision. As one does this, one must bear in mind what Chaskalson P said in the *Pharmaceutical Manufacturers'* case, namely that a decision that is objectively irrational is likely to be made only rarely. Of course, I am saying this insofar as it seems that there is much commonality between justifiability and rationality. One must also bear in mind the importance of maintaining the distinction between appeals and reviews. It must also be borne in mind that the Act contemplates that the disputes that it requires to be referred to arbitration are meant to be put to an end by way of arbitration and that the dispute-resolution dispensation of the Act – which is meant to be expeditious – would collapse if every arbitration award could be taken on review and set aside".

. It is in that context that, in my opinion, the application for the review and setting aside of the Second Respondent's finding of procedural unfairness in the dismissal of the Third Respondent, must fail. There is nothing, whether or not the conclusions and perceptions of the Second Respondent would be shared or concurred in by another adjudicating forum or might constitute grounds for appeal if that were possible, to suggest however that in reaching them, the Second Respondent did not have recourse or did not properly apply his mind to the evidential material before him and that they were not rationally formulated. The substance and structure of his award negates any such impression or perception. The fact that, in reaching his conclusions, he has highlighted specific aspects of evidence, the transcription of which before this court extends over more than four hundred pages of record, does not for one moment suggest that he did not consider its *conspectus*. What the Second Respondent has manifestly done, is to extract from that body of testimony the specific aspects considered by him to constitute procedural irregularity and, for the reasons which I have stated, I can find no reason to interfere with his determination in that regard. The application for the review of that specific aspect of

the award cannot therefore be sustained.

. The award of compensation made by the Second Respondent is however a separate issue and what is, to say the least, unusual in that regard is that its review and setting aside is sought by both parties, albeit for different reasons. The Applicant (in convention) submits that, in the event, as has proved to be the case, that this court finds that the dismissal of the Third Respondent by the Applicant was, as determined by the Second Respondent, procedurally unfair, the Second Respondent -

> "… made an arbitrary and capricious award which is not in accordance with the formula for the calculation of compensation provided for in Section 194(1) of the LRA. As such the award is irregular and incorrect".

. It is further submitted that

> "… had the Second Respondent applied his discretion, it should have been exercised in favour of not granting the Third Respondent any compensation for a procedural irregularity by virtue of the fact that it would be tantamount to rewarding the Third Respondent for being abusive and morally reprehensible, which award would be against the norms of public opinion and society in general."
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> The Second Respondent having found that the misconduct with which the Third Respondent was charged had been established and that his dismissal was accordingly substantively fair, -
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> "… the Third Respondent should not be seen to be rewarded and/or compensated at the expense of the Applicant for such misconduct on a procedural irregularity only".

. The Third Respondent (the Applicant in reconvention) on the other hand seeks the review and setting aside of the compensation award on two grounds. The first is that the Second Respondent -

> "ignored relevant evidence which was placed before him, alternatively failed to apply his mind to

the matter insofar as the correct calculation of compensation that the Applicant is entitled to is concerned. The Second Respondent failed to take into account, alternatively to properly take into account the Applicant's rate of remuneration on the date of dismissal which was R7 158,82 per month".

. The Second Respondent furthermore –

"… failed to take into account the law and the authorities relating to the calculation of compensation to which the Applicant is entitled in the event of an unfair dismissal"

alternatively failed to apply his mind to that matter. He failed, it is contended,

"to take into account that the date of dismissal was 9 September 1998 and that the final day of the arbitration was 17 November 1999, more than twelve months after the date of the dismissal; had the learned Commissioner applied his mind to the relevant legal principles and the provisions of the LRA and had he taken the relevant evidence regarding the Applicant's rate of remuneration at the time of dismissal, the authorities and the law into account, he would have awarded the Applicant compensation in the amount of R85 905,84.

. Section 194(1) of the Labour Relations Act 1995 reads thus:

"(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. 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".

That issue was comprehensively examined by the Labour Appeal Court in -

Johnson & Johnson (Pty) Ltd v CWIU (1999) 20ILJ 89

This is what Froneman DJP (as he then was) said at page 99 of the report.

"The express terms relating to the making of a compensation award in Section 193(1) … are permissive in nature ("may"). In contrast the exclusion of reinstatement or re-employment as remedies in a procedurally unfair dismissal in Section 193(2) is in peremptory terms ("must"). On a literal reading of the Section compensation need not necessarily be awarded upon a finding of a procedurally unfair dismissal; another option is to grant no consequential relief.

None of the other provisions of the LRA compels a different reading of Section 193(1). Section 158(1)(a)(v) makes it clear that a compensation order is only one of the general kind of "appropriate" orders that the Labour Court may make. Section 194 deals with *how* compensation must be calculated in different circumstances, not with *when* and *why* compensation must be awarded.

If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not. If compensation is awarded it must be in accordance with the formula set out in Section 194(1); nothing more, nothing less. The discretion *not* to award compensation in the particular circumstances of a case must, of course, also be exercised judicially."

. In the instant case, it is not open to dispute that the period between the date of the Third Respondent's dismissal and the final date of the arbitration exceeded the twelve months in relation to which the calculation of compensation in terms of Section 194 of the Act is limited. The Second Respondent therefore in determining, to all intents and purposes arbitrarily, that the Third Respondent be paid "six month's salary as compensation for procedural unfairness," manifestly ignored, or failed to apply his mind to, the *dicta* in ***Johnson*** *(supra)* and the relevant provisions of the Act. If, as appears to have been the case, an award of compensation was appropriate, that award should have been the equivalent of twelve month's remuneration.

. The Second Respondent offers no reasoning to support or justify the exercise of his discretion in favour of a compensation award. It is open to speculation therefore whether, had he been conscious of the fact that, in those circumstances, he was obliged to make an award of twice the amount in fact

decreed by him, he would have awarded compensation at all, having regard to the substantive findings made by him, or whether, in the result, the award constituted merely an error in formulation.

. Whatever the position however, that aspect of the Second Respondent's award constitutes a gross irregularity and cannot be allowed to stand. The Applicant in reconvention moreover, does not substantiate its submission regarding the discrepancy in the amount reflected by the Second Respondent as the Third Respondent's monthly salary and the amount factually contended to be correct and it may well be that, in that regard, a further error has been perpetrated.

. These are aspects of the dispute which must, in my opinion, therefore be revisited and re-assessed, not by a Commissioner other than the Second Respondent, but by the Second Respondent himself in the context of this judgment and the order that I make is accordingly the following:

The application for the review and setting aside of the Second Respondent's award dated 23rd February 2000 that the Third Respondent's dismissal by the Applicant was procedurally unfair, is dismissed.

The Second Respondent's order for payment of compensation by the Applicant to the Third Respondent in an amount equivalent to six month's remuneration is reviewed and set aside.

Only that aspect of the award, including, if necessary, the factual determination of the correct rate of remuneration earned by the Third Respondent at the date of his dismissal, is to revert to the First Respondent to be reconsidered and re-assessed by the Second Respondent in the light of this judgment.

The Applicant is to pay the Third Respondent's costs of this application only insofar as they are determined on taxation or by agreement to relate to the issue of procedural fairness.

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B M JAMMY
Acting Judge of the Labour Court

6 December 2001

Representation:

cant:

La Grange

Respondent

van Vuuren instructed by A C Schmidt Inc.