JUDGMENT

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO:

C873/2005

In the matter between:

SAXENBURG ESTATES (PTY) LTD Applicant

and

THE COMMISSION FOR CONCILIATION, First Respondent

MEDIATION AND ARBITRATION (CCMA) Second Respondent

K MOSHLOLI N.O.

ARNOLD VORSTER Third Respondent

J U D G M E N T

NEL AJ:

[1] This is an unopposed application in terms of section 145 of the Labour Relations Act, 66 of 1995 for the review and setting aside of an arbitration award of the second respondent ("the Commissioner")

[2] The third respondent ("Vorster") was employed by the

applicant (also referred to further herein by me as "Saxenburg" or "the employer") for a probationary period of six months as its brand manager at the Saxenburg Farm and Restaurant in Kuils River. This probation commenced on 22 November 2004. Vorster was dismissed some three months later. The reason for the dismissal is provided in a letter to Vorster in which it was stated that:

> "... it has been decided to give you notice that your work fit, and the meeting of performance requirements during your probation period has not been successful..."

[3] At the arbitration the applicant called a number of witnesses to testify about the alleged incompatibility and poor performance of Vorster during his probationary period. Mr Bührer, ("Bührer") the main shareholder in the applicant, in summary testified that he had numerous formal and informal meetings with Vorster. He had advised Vorster that he could no longer work in the tasting room, because he could not get along with the person in charge there, Ms Bruwer. He contended that Vorster had no comments. He then gave Vorster a chance in the restaurant, but he could also not get along there with the rest of the team. Bührer then had a meeting with Vorster, which was also attended by Ms Mellor ("Mellor"), the Director: Marketing & Development for Saxenburg.

[4] Mellor did not testify at the arbitration. Bührer only read

out an affidavit deposed to by her in England on 10 August 2005. This affidavit read as follows:

> "I hereby confirm that I know Arnold Vorster and that he worked for Saxenburg Wine Farm. Mr Adrian Bührer and I had an official meeting with Arnold at Saxenburg at the end of January. We had this meeting with Arnold because his work was not at the required standard for someone in his position. He had difficulties with Giselle Bruwer in the tasting room and showed rude behaviour and attitude dealing with the Guinea Fowl Restaurant affairs. He was therefore told to stop working with the tasting room and the restaurant and to concentrate on hosting clients and guests on the farm. Arnold agreed to it and never discussed the matter further".

[5] Bruwer, the applicant's wine-tasting manager, testified that she had come into contact with Vorster when he came to work in her department. She said that on one or two occasions he was rude to her. The applicant's Guinea Fowl Restaurant manager, Mr Romer, also testified that Vorster was rude. The whole restaurant team allegedly had complained to him about Vorster. He, however, never took this up with Vorster and the two of them never had any arguments. The applicant's wine-maker/director, Mr Nicholas van der Merwe, testified that he was present when Vorster was interviewed and his evidence was essentially to the effect that Vorster never visited him at

the vineyard nor did he come to his office to ask him about wine-making.

[6] Vorster, on the other hand, denied that he was ever told by his employer that he was performing poorly. He alleged that no pre-termination procedure was followed at all such as any evaluation, instruction, training, guidance or counselling. He testified that he held a postgraduate qualification in wine management and marketing from the University of Stellenbosch. He saw an advertisement for the position of marketing co-ordinator, Stellenbosch, at the applicant, and he applied. After having been interviewed, Vorster was surprised to be offered the position of sales and events manager instead. He contended that the contract he received was markedly different from what had been discussed in his interview. He advised Bührer of his misgivings, and after long discussions, he was given a new contract for the position of brand manager at the applicant. Vorster testified that he believed that, by showing his dissatisfaction with the first contract offered to him, this must have caused a breakdown in the working relationship and he contended that this led to Bührer systematically isolating him and progressively working him out of the company.

[7] In respect of Bührer's evidence that Vorster had been orally advised that his employer was not satisfied with his performance, it was denied by Vorster that this ever happened. He specifically denied that at the meeting at

which Mellor was present, at the end of January 2004, he had been advised of any dissatisfaction by his employer with his performance.

[8] The documents placed before the Commissioner, and also contained in the file before me, reflect that Vorster submitted daily reports to Bührer which were copied to Mellor. Vorster testified that he received no written correspondence and very little verbal communications from Bührer over the period of his employment. He testified that Mellor, whom he was to assist from time to time, gave him very little to no feedback on queries and ideas that he would forward to her.

[9] Vorster said that if he did not send a daily report, he would immediately be made aware of it. He testified that he however received very little to no feedback on any of his reports. He expressed the view that, if he was not performing as expected, any reasonable person would respond to these daily reports or question aspects of what he had reported he had done. He testified that, after having written daily reports, he would have expected some kind of report-back on poor performance as this would have provided him with the opportunity to rectify any negative situation. He however had no feedback or knowledge of negative perceptions or of causing unnecessary tension in the company. He accordingly was very surprised to hear from Bührer on 23 February 2004 that Bührer was not satisfied with his work performance and that he was

therefor going to terminate his contract due to poor work performance.

[10] Vorster testified that in a career of 16 years and working in a range of industries and any number of companies in South Africa and the United Kingdom, he had never seen such an obvious disregard for work ethics and consideration for the rights of employees. He also testified that, having worked in his position for such a short period of time, in a very specialised field such as the wine industry, with limited employment options, and being well known by peers and colleagues in the industry, had proven detrimental to his future career prospects. His dismissal had put great pressure on him financially and emotionally and had jeopardised his prospects to work in the industry in the future to further his career. His evidence was further to the effect that less than 1% of people in the industry held the qualification he had of a postgraduate qualification in wine management and marketing, or his kind of experience. According to Vorster, most people in the industry probably did not even know of his kind of qualification and to find a position in this particular field was rare in this country. He expressed the view that it could take him years to repair the damage done to his career and he accordingly sought compensation for the unfair treatment and disregard for his wellbeing.

[11] The applicant's grounds of review are essentially that the Commissioner committed a gross irregularity in the

proceedings, alternatively misconduct in relation to his duties as an arbitrator and that he thereby deprived the applicant of a fair hearing by having displayed bias against the applicant and having caused the reasonable impression that the applicant was not being given a fair hearing; by handing down an award which was not justifiable with reference to the reasons given and the evidence which served before him; by failing to apply his mind to relevant considerations; and by taking irrelevant considerations into account.

Apparent bias

[12] Essentially the facts which the applicant relies on for the allegation that the Commissioner was biased are the Commissioner's conduct in the proceedings and his alleged one-sided analysis of the evidence. It was contended that a further example of the bias against the applicant was that the Commissioner allegedly accepted Vorster's oral evidence as opposed to the written evidence in the form of letters themselves.

[13] A lot was made of the Commissioner's conduct relating to an earlier application for a postponement of the arbitration on behalf of the applicant. The applicant complains about the use by the Commissioner in his award of the words that he "reluctantly" postponed the matter and contended that the use of this adverb was evidence of the Commissioner's bias against the applicant in favour of

Vorster. It was also contended in argument before me that, when the applicant's representative appeared before the Commissioner on the hearing recommencing on the second day, he formed the opinion that the Commissioner still held the earlier application for a postponement against the applicant. This conclusion appears to be based on the allegation that the applicant complains about the fact that the Commissioner, at the commencement of the arbitration proceedings placed it on record that the matter had been postponed once before and that the applicant had been ordered to pay the CCMA its costs in respect of that postponement. Issue is also taken with the fact that the Commissioner at the outset of the arbitration proceedings placed it on record that Vorster had reserved his right to make an application for costs at the end of the arbitration hearing. Further reliance for the allegation of bias is placed on the fact that then, at an early stage of the postponed proceedings, the Commissioner complained to the applicant's representative about the fact that the applicant had previously applied for a postponement. It is contended in the applicant's founding affidavit to the review application that all of this caused the applicant's representative to form the view that it was all done to place the applicant in a bad light and as a partisan display of support for Vorster. The applicant's representative deemed it necessary to place the whole postponement application in perspective. This appears to have been in response to the Commissioner's contention that the earlier application for a postponement had not been made in

compliance with rule 23 of the CCMA rules. The record reflects that the Commissioner did not take issue with the applicant's representative in this regard. Not having done so appears to be the basis for the applicant's complaint that his attempt to place the whole postponement application in perspective was met with short shrift on the part of the Commissioner.

[14] A particular further complaint by the applicant is that the Commissioner cut questions of the applicant's representative short and prevented him from raising valid objections and removing apparent misconceptions. This contention made in the applicant's heads of argument is only supported with reference to the applicant's founding affidavit, but not with reference to any specific examples in the record itself.

[15] With reference to President of the RSA v South African Rugby Football Union 1999 (4) SA 147 (CC) ("the Sarfu case") and SACCAWU & Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) (2000) 21 ILJ 330 (LAC) at paragraphs [24] to [27], I was reminded by Mr Stelzner, who appeared before me on behalf of the applicant, that the test as to bias is whether, seen objectively, there exists a reasonable apprehension that the Commissioner may have been biased, as viewed by a reasonable, objective and informed person having regard to the correct facts. In the Sarfu case (supra) the following was said by the court at page 175 F – G:

> "An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test."

Bearing this in mind, I have assessed the aforementioned complaints and the facts relied on by the applicant for its contention that there exists a reasonable apprehension that the Commissioner may have been biased.

[16] In his award the Commissioner, with reference to the applicant's application for a postponement, records that the reasons for the postponement were contained in a letter faxed to the CCMA at 07h45 on the morning of the arbitration and that Vorster opposed the application. The Commissioner then says:

> "I reluctantly postpone the matter, even though the application did not comply with Rule 23 and 31 of the Rules for the conduct of the proceedings before the CCMA on
> 20 March".

[17] Properly read in context, I do not believe that the Commissioner's recordal that he reluctantly postponed the matter, viewed reasonably and objectively, and having regard to the correct facts, provides any justification for a reasonable apprehension of bias. I likewise have

considered the *ipse dixit* of what the Commissioner recorded when the arbitration proceedings commenced the second time around. I am similarly unpersuaded, viewed reasonably and objectively, and having regard to the correct facts, that the Commissioner's conduct could give rise to a reasonable apprehension that he may have been biased. It is not uncommon, where a matter recommences after an opposed application for postponement had been granted, for the presiding officer to summarise the events that had preceded recommencement of the proceedings. I particularly regard as without foundation, and in fact quite far-fetched, the proposition that the applicant's representative formed the view that the Commissioner, in recording the history of the matter, with particular reference to the postponement, that he did so simply to place the applicant in a bad light and as a partisan display of support for the third respondent. This is an untenable proposition. That he treated Visser's efforts to set the record straight "with short shrift" is also in my view unfounded. On the material before me, it appears as if the application for postponement did as a matter of fact not comply with the rules of the CCMA. I am sure that if the Commissioner had engaged Visser in a debate on this issue, he would still have been accused of displaying bias against the applicant. The fact that he did not respond to Visser's exposition of what had happened cannot be a reasonable basis on which to form the view that the Commissioner was possibly biased against the applicant.

[18] I have perused the entire record to determine whether I could find any shred of support for the applicant's contention that its representative, Visser's, questions were cut short and that he was prevented from raising valid objections and removing apparent misconceptions. On doing so, what I did find was that the Commissioner, in my view, in a very even-handed manner, and correctly so, on occasion reprimanded both Visser, who is attached to the Cape Agri Employers' Organisation, and Vorster. Viewed in proper context, the Commissioner was, as I said, perfectly justified in doing so. Again, viewed reasonably and objectively, and with regard to the correct facts, the Commissioner's interventions could not lead to a reasonable apprehension that he may have been biased.

[19] The next complaint levelled against the Commissioner by the applicant in support of the allegation of bias on the part of the Commissioner, is that it is alleged that he analysed the evidence in a one-sided manner.

[20] The Commissioner is severely criticised for the fact that he did not in his analysis at all indicate that the third respondent, when he gave his evidence, simply read from a written statement he had prepared prior to the hearing. I do not believe that the fact of a witness having read his evidence in chief from a prepared statement, warrants, in and by itself, to be mentioned. Vorster represented himself. Had he been represented, he very possibly may have been led in chief by his representative taking him

through a previously drawn statement. Such statement would seldom be placed before the witness, and he merely be asked by his representative to read it. If a witness in a trial had done his preparation properly, he would be "led" through his prepared statement by his representative, most likely along the very lines of the prepared statement itself. There is nothing wrong with a witness having been prepared for his evidence through the use of a prepared statement and being taken through it. Not having the prepared statement before him, clearly allows the trier of fact to assess the memory of the witness. To remember untruths is probably more difficult than the truth. So the fact that a witness may have read a prepared statement, is a factor to be taken into consideration by the presiding officer. The quality of the evidence of a witness is most always best tested during cross-examination. It is then that the truth or otherwise of his evidence, when he is now confronted, so to speak outside of his prepared "script', most always comes to the fore. It does not matter how well he may have rehearsed his prepared statement – if there are weaknesses or untruths in his evidence in chief, that most always are only detected during cross-examination. For the unrepresented applicant to therefor read from his prepared statement is not, as I said, in and by itself something worth mentioning by the trier of fact. It is how his evidence in chief stood up under cross-examination which particularly requires the presiding officer's attention. Seldom does one hear that a witness was bad during his evidence in chief. The Commissioner did

assess the evidence of Vorster and found that he held up well under cross-examination, was not shaken and stuck to his version of events. The mere absence of a reference by the Commissioner to him having read his evidence in chief from a prepared statement does not warrant a conclusion of bias. It also does not in and by itself render his analysis of the evidence one-sided or irregular.

[21] The applicant complains about the Commissioner's conclusion that witnesses of the applicant seemed to be "singing in rehearsed tune" which the Commissioner says left him "pondering whether the witnesses might not have fabricated these claims of rudeness". The applicant is further aggrieved by the Commissioner's conclusion that "apart from the bald statements made by Bührer at the arbitration, there is no evidence whatsoever that there was any disharmony and/or tension at respondent's workplace, resulting from Vorster's behaviour".

[22] Quite apparently these conclusions of the Commissioner must be viewed in proper context and having regard to the evidence as a whole, and not only to that of one witness. Doing so, one sees that the Commissioner methodically summarised the evidence and argument in respect of Bührer and all the other witnesses. As far as Bührer is concerned, he did so not only with reference to his evidence in chief, but also in great detail with reference to his evidence under cross-examination.

[23] The Commissioner then equally methodically recorded what he believed to be the applicable law which he had to apply. He did so with particular reference to the applicable guidelines for dismissal during probation as are set out in clause 8 of Schedule 8 of the LRA. What is further to be noted is that the Commissioner was clearly, and correctly so I believe, alive to the fact that he was dealing with two aspects, namely the employee's performance during the probationary period, as well as the fact that the employer alleged that the probationary employee was unable to work in harmony with his colleagues or to adapt to the corporate culture of his employer. The Commissioner was alive to the fact that incompatibility was being alleged by the employer. When the Commissioner, in his award, dealt with the application of the facts to the law, he commences with the question: "Did the respondent comply with the relevant guidelines?" Then followed the Commissioner's assessment that Bührer's statements were bald.

[24] In this regard, as I have said, the Commissioner specifically had recorded that the test for substantive fairness of a dismissal for incompatibility included the question whether the employee's conduct caused disharmony or tension in the workplace. It is patently clear from the Commissioner's statement that it was with reference to this very particular issue, namely his assessment whether there was evidence of disharmony and/or tension, that he regarded Bührer's statement as bald.

[25] I will again revert to the Commissioner's analysis of the evidence later herein but I am of the view that, viewed reasonably, objectively and with regard to the correct facts, the analysis of the Commissioner of the evidence before him could not lead to the existence of a reasonable apprehension that the Commissioner may have been biased, or that he analysed the evidence in a one-sided manner.

[26] This ground of review of the applicant must accordingly fail.

Relevant evidence which was ignored

[27] In support of this ground of review, the applicant contended that the Commissioner did not analyse Vorster's evidence at all. His analysis of the evidence was accordingly contended to be one-sided and simply done in order to undermine the cogency of the applicant's evidence.

[28] It was argued by Mr Stelzner that, where there were conflicting versions, the evidence needed to be evaluated in accordance with the principles enunciated in S F W Group Ltd & Another v Martell et Cie & Others 2003(1) SA 11 (SCA) at 14 I- 15 E, Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) and Medscheme Holdings (Pty) Ltd & Another v Bhamjee 2005 (5) SA 339 (SCA). Mr Stelzner argued that this would require an evaluation of the credibility of witnesses with reference to a host of

different factors and an evaluation of the probabilities of each witness' evidence, weighing up the evidence of the different parties against each other. It was contended on behalf of the applicant that the Commissioner had failed to follow this approach, and in so doing had deprived the applicant of a fair hearing.

[29] Whilst conflicting versions unquestionably need to be evaluated in accordance with the principles enunciated in the cases referred to above, I believe the Commissioner herein approached the analysis of the evidence clearly by first having correctly stated what he regarded as the applicable law. Having done so in very clear and specific terms, he then proceeded to assess the evidence of the employer as the party which bore the *onus* to satisfy the Commissioner that all the requirements of the applicable law had been met in terms of the facts it had adduced. In this process, it is clear that the Commissioner assessed whether the evidence presented on behalf of the employer before him satisfied the Commissioner that the employee's conduct did cause disharmony or tension in the workplace. He arrived at his conclusion in a fairly extensively reasoned process. Even if this reasoning process is open to some criticism, I am in the first place unable to arrive at the conclusion that the Commissioner acted irregularly, or that he misconducted himself in the conduct of the proceedings to an extent that warrants an interference by this Court by reason of the Commissioner's wrong or improper evaluation of the evidence. Having regard to the

reasons, and particularly having scrutinised the evidence and the material placed before the Commissioner, I believe that the Commissioner reasoned his way through to a justifiable and rational conclusion relating to the evidence before him. As I said, even if this reasoning of his may be open to some criticism, I am not persuaded that there are grounds to conclude that the Commissioner ignored the relevant evidence. I am satisfied that the basis for, and the approach adopted for his reasoning, is sound.

[30] It is trite that a review or appeal court will not easily interfere with findings of credibility made by the tribunal of first instance. It is equally trite that a review court will do so where findings are plainly wrong. Although the choice of wording by the Commissioner to the effect that Bührer was not an impressive witness right from the start of his testimony may be subject to criticism, an assessment of Bührer's testimony in my mind supports the Commissioner's conclusions that he was evasive and full of contradictions.

[31] Particularly in regard to the question, what procedures were followed in terminating Vorster's employment, Bührer's evidence was, I believe, contradictory. It is apparent from his answers under cross-examination that the meeting Bührer and Mellor had with Vorster was regarded by Bührer as the first process relating to the termination of Vorster's employment. On a number of occasions Bührer responded that the applicant had provided

Vorster with written communications relating to his performance. He later contradicted this evidence by alleging that it was just done verbally and never in writing.

[32] Another issue of great controversy raised by the applicant, and in respect of which it alleges that Vorster had contradicted himself, was the dates on which the applicant had given Vorster written notice of the termination of his employment. Vorster pointed out under cross-examination, how could he have been given his letter of termination on 28 February 2004, as was alleged by the applicant, if he had replied thereto on 24 February 2004? In the documents both before the Commissioner and this court, there are two letters from the applicant both dated 28 February 2004. One is a short letter, advising Vorster of the termination of his employment. The other is an extensive reply to Vorster's letter dated 24 February 2004. Vorster's letter of 24 February 2004 attacks the fairness of his dismissal. It is highly unlikely, and most improbable, that these two letters of the applicant were in fact only issued by it on 28 February 2004. It is much more probable, and believable, as testified by Vorster, that he was given the first letter on 23 February 2004, even though it was post-dated to 28 February 2004. I am unpersuaded that Vorster had contradicted himself in this regard. On the contrary, it is the applicant's evidence which is questionable on this issue.

[33] I am unpersuaded that the Commissioner failed to assess

the evidence properly and that there is sufficient merit in this ground of review of the applicant to warrant interference by this Court with the Commissioner's award in question.

Irrelevant considerations which were taken into account

[34] It was contended on behalf of the applicant that, in addition to the Commissioner having improperly applied his mind to the relevant factors, he also took irrelevant factors into account. The Commissioner was criticised for regarding Bührer's evidence as evasive, particularly with regard to his answers when cross-examined about an advertisement for the post of marketing coordinator placed by the applicant and to which Vorster testified he had responded. It was contended that the Commissioner was not justified in concluding that Bührer's evidence was evasive in respect of the advertisement as the advertisement was placed by a personnel agency on behalf of the applicant and Bührer himself had never seen the advert. The advert also did not refer to Saxenburg Estates (Pty) Ltd.

[35] Having regard to the *ipse dixit* of Bührer's evidence, and his responses under cross-examination relating to the advertisement, and of course to the evidence as a whole relating to what the advertisement was Vorster said he responded to, and the evidence in its totality, I am of the view that the Commissioner was justified in his

conclusions, having regard to the reasons given therefor and the evidence and material placed before him.

[36] Time and time again the Commissioner is criticised for not having evaluated and assessed Vorster's evidence. One does of course find that the Commissioner did indicate his displeasure with the manner in which Visser cross-examined Vorster on behalf of the applicant. In this part of his award, the Commissioner did record that Vorster, all-in-all, stuck to his story and was not shaken.

[37] I have indicated earlier herein that one must assess the Commissioner's reasoning against the very specific structure in which he reasoned his way through to his conclusion. He in very clear terms spelt out what the very specific elements were which an employer had to satisfy a Commissioner in an arbitration under circumstances where it dismissed an employee for alleged lack of performance and incompatibility. It is further clear from the Commissioner's reasoning that he weighed the evidence of the employer, who bore the *onus* of proving the fairness of the dismissal, against the very specific requirements which an employer had to meet to satisfy the *onus* of proving the fairness of the dismissal. It is also clear that the Commissioner was reasoning through the evidence on behalf of the employer to determine whether, on a balance of probability, the employer had discharged the onus to satisfy the Commissioner that it had met the legal requirements for a termination of employment based on

alleged lack of performance and alleged incompatibility.

[38] Yet again I have assessed the multitude of complaints levelled against the Commissioner with reference both to the record of the proceedings as well as the very specific conclusions which the Commissioner had reasoned himself through to. I am unpersuaded that he improperly had any regard to irrelevant considerations. This being a review, and not an appeal, I have been unable to find that the conclusions which the Commissioner arrived at are not justified and rational having regard to the reasons given therefor and to the material and the evidence before the Commissioner.

Justifiability of the award

[39] It is trite that an award is reviewable when an arbitrator misconstrues the nature of the dispute such as to prevent a fair trial of the issues before him.

[40] An award may also be vitiated by a gross irregularity, either when the Commissioner commits so many misdirections that cumulatively they add up to a failure of justice, or where there has been a single serious misdirection which is central, or fundamental, to the entire award.

[41] In Carephone v Marcus N.O. & Others (1998) 19 ILJ 1425 (LAC) at 1435E-F the rationality test has been succinctly

stated as follows:

> "Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at".

[42] Applying this test, I am unpersuaded that the factual and legal conclusions arrived at by the Commissioner were based upon any fundamental errors or misdirections of fact or law.

[43] I am satisfied herein that the Commissioner has properly reasoned his way through to the conclusions he arrived at and that his conclusions are justifiable and rational having regard to the material and evidence before him.

Justifiability of compensation awarded

[44] The applicant complained that the Commissioner failed to have regard to the short period that Vorster was employed and to the fact that he was, in any event, nearing the end of his probation period. It would appear as if the applicant is particularly aggrieved by the amount of compensation awarded because of the fact that Vorster's probation period was for six months only. The argument is apparently that, at the end of the probation period, Vorster was to be advised of the confirmation of his appointment or termination of employment. This, according to the

applicant, suggested that Vorster's initial employment was simply for six months subject to confirmation of appointment thereafter. To the extent that it is proposed that the employment contract in question was a fixed term contract, I do not believe that this point was argued before the Commissioner and, in any event, such a proposition has no merit. Vorster was clearly employed on a permanent basis, but with a probation period of six months. I am of the view that the Commissioner was perfectly alert to this and that he correctly applied the principles applicable to a probationary employee. To suggest that, if the applicant had taken no steps whatsoever, Vorster's contract would have expired at the end of his period of probation is simply untenable, having regard to the evidence and the documents. I am of the view that it was never contended by the applicant during the arbitration that Vorster's contract of employment would after six months expire by passage of time.

[45] Having arrived at the decision that the Commissioner's conclusion that the termination of Vorster's employment was not for a fair reason and not in terms of fair procedure is justifiable, having regard to the reasons given, and the material before him, it is not open to the applicant to argue that the applicant is effectively being punished with a penalty of an additional eight months' remuneration at R15 000 per month. Clearly the approach must be that there was no justification for the termination of Vorster's employment at all. Therefor, the fact that he was so close

to the end of his probation period becomes rather irrelevant. The moment the Commissioner concluded that Vorster was substantively unfairly dismissed, it follows that he was entitled to approach the matter on the basis that the employee would have remained in his employment indefinitely, at least until there was proper cause for the termination of his employment.

[46] The applicant also in particular takes issue with the fact that the Commissioner indicated that, to reflect his disapproval and censure of the way in which the employer handled the termination of Vorster's probation, the amount of compensation which would properly give effect to these sentiments was nine months' remuneration at R15 000 per month, amounting to R135 000.

[47] In arriving at his conclusion as to what would be a just and equitable sanction, having regard to how clearly he spelt them out in his award, the Commissioner would not have disregarded the very clear requirements of law applicable to dismissals for lack of performance or incompatibility. The Commissioner concluded that the employer failed to meet its legal obligations towards the employee. This justifies the Commissioner wanting to “censure” the employer. It also has the effect that the Commissioner was justified in approaching the sanction on the basis that the employee, but for the unfair dismissal, would have continued in the employ of the employer indefinitely as he had found that there was no proven just cause for the

termination. Apart from the Commissioner having indicated that his award was to reflect his disapproval and censure of the way in which the employer handled the termination of Vorster's probation, one does however not know what exactly the factors were that the Commissioner considered in arriving at this amount of compensation.

[48] Mr Stelzner provided me with supplementary notes, arguing in the alternative, in the event of me deciding not to review and set aside the award *in toto*, that part of the award dealing with the compensation awarded by the Commissioner be reviewed and set aside as being unjustifiable. He contended that the cases relied on by the Commissioner, M Siebrits v Club Insomnia (Pty) Ltd & Others, unreported case number C245/2005, and Rudi Govender & 13 Others v Gilt Edged Management Services, unreported case number C829/2002, do not support the approach followed by the Commissioner, namely to "censure" or "punish" the applicant. This rendered the compensation awarded by the Commissioner unjustifiable as well as revealed a gross error of law, so argued Mr Stelzner. He contended that in both the Govender and Siebrits cases, the court had regard to all the relevant facts and circumstances of the case in arriving at its award. It was argued that the Commissioner in the present matter provided only one ground in justification of his award, namely the way in which the employer had handled the termination of Vorster's probation. In the absence of a clear indication that the Commissioner had considered all

the relevant factors before arriving at a decision what was a just and equitable sanction, this amounted to a reviewable irregularity, so it was suggested.

[49] Relevant factors to be considered, as stated in Ferodo (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC), are:

- The award must endeavour to place the employee in monetary terms in the position which he would have been had the unfair labour practice not been committed;
- In making the award the Court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party.

Mr Stelzner suggested that if the Commissioner had applied his mind to all the factors, he ought to have concluded that three months' remuneration would meet the present case fairly.

[50] As I have said, the Commissioner did give scant reasons why he arrived at an award of nine months. There is no reason to believe that the Commissioner did not also apply his mind to the evidence by Vorster as to what the consequences of his unfair dismissal were. In this regard it must be

remembered

that the uncontested evidence by Vorster was that, having worked in his position for such a short period of time in a very specialised field such as the wine industry with limited employment options, and being well known by peers and colleagues in the industry, had proven detrimental to his future career prospects. He specifically ascribed the absence of fair procedures such as counselling, warnings, pre-termination procedures and a disregard for him, as having placed him in a vulnerable position, which compromised his position. To find a position in his field, was rare in this country. He further testified that it could take him years to repair the damage done to his future career. It is apparent that he operated in a small industry. I have referred to Vorster's evidence in this regard in paragraph [10] above. Although the Commissioner may therefor be criticised for not having indicated what factors he did consider in arriving at 9 months' compensation, all these facts were clearly before him. If I were to review and set his award aside, I am clearly in a position to substitute the award with that of this court. In an endeavour to place the employee in monetary terms in the position which he would have been, had he not been unfairly dismissed; and being guided by what is reasonable and fair in the circumstances; and having regard to the undisputed evidence of Vorster in respect of what this unfair dismissal has done to him; and being of the view that, had

proper and fair employment practices been followed, Vorster would most likely have both fitted in and performed at an acceptable level at Saxenburg, I believe I would have awarded him the maximum compensation allowed by law, namely twelve months. Mr Stelzner's proposition of three months is, I believe, based on the notion that Vorster was but a month away from his end of probation. I have rejected this proposition. Obviously the short length of Vorster's service is a relevant factor. In this case, the short duration of his employment, understandably has according to Vorster caused him even more harm. The uncontested evidence of the serious nature of the harm suffered by Vorster as a result of his unfair dismissal weighs heavily with me. I am also of the view that the conduct of the employer herein was grossly unfair. I do accordingly not believe that any purpose will be served by me reviewing and setting aside the compensation part of the Commissioner's award. If I were to do so and substitute it with the award of this court, as I said, the compensation awarded would have been 12 Months. As I do not believe that the compensation awarded is at all, or so shockingly disproportionate that it warrants any intervention on the part of this Court, even if it is perhaps lacking in reasons for having arrived at that particular award, I do not believe there are grounds to review and set it aside. Under all these circumstances, I do not believe that any grounds exist for me to interfere with the Commissioner's compensation awarded.

[51] In the result, the application falls to be dismissed.

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DEON NEL

Acting Judge of the Labour Court

DATE OF HEARING: 10 AUGUST 2006.

DATE OF JUDGMENT:

APPEARANCES:

On behalf of the applicant: Advocate R G L Stelzner

Instructed by Basson Blackburn Inc