IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO:JR 2158/07

DATE: 8 SEPTEMBER 2008

Reportable

In the matter between

RUSTENBERG BASE METAL REFINERS (PTY) LTD APPLICANT
(Respondent in the cross application)

and

SOLIDARITY FIRST RESPONDENT
(Applicant in the cross application)

B M VAN RENSBURG SECOND RESPONDENT

C P WATT-PRINGLE SC N.O. THIRD RESPONDENT

JUDGMENT

PILLAY D, J

1. This review in terms of section 33[1] of the Arbitration Act, 42 of 1965 proceeds on two grounds. The first ground is that the third respondent arbitrator exceeded his terms of reference and powers by entering the merits of the dispute; the alternative ground is that the arbitrator committed a gross irregularity in failing to afford the parties a hearing about his alleged change in interpretation of his terms of

reference.

2. The background to the dispute is that the second respondent employee was charged for sexual harassment, using abusive language and insulting the employee he allegedly harassed. Following a disciplinary inquiry, David Matobako, a senior superintendent employed by the applicant employer, found the employee not guilty of sexual harassment but guilty of using abusive language and insulting the employee.[1]

3. On 16 March 2006, Matobako issued the employee with a final written warning for six months. Dissatisfied with this outcome, the employer appointed another chairperson to review the outcome of the inquiry. On 24 April 2006, it invited the employee to make representations to the review and suspended him pending the review. Both parties made representations to the chairperson of the review.

4. On 16 May 2006, the chairperson of the review substituted the not guilty finding of the sexual harassment charge with a finding of guilty. He concurred with the finding of guilty on the use of abusive language charge. On the assault charge, he found the employee guilty of indecent assault, which is not what the employee was charged for. The chairperson of the review substituted the final written warning with the penalty of dismissal.[2]

[1] Pleadings, page 91
[2] Pleadings, page 112

5. The parties then agreed to refer the dispute to the arbitration which is reviewed in this application. The arbitrator's terms of reference were:

> "The terms of reference of the arbitrator in respect of the point *in limine* will be whether the employer had the right to review and overturn a decision of an internal disciplinary chairperson with an increased sanction on review; and on the merits, will be whether the dismissal of the Applicant was both procedurally and substantially unfair."[3]

The arbitration agreement defined the point *in limine* to mean:

> ""The *point in limine*" means in essence the issue whether or not the Respondent was entitled to internally review the decision of the first disciplinary inquiry chairperson, as is more fully set out in a Stated Case that has been extensively discussed, and will be signed by the representatives of the parties." [4]

6. It recorded that the third respondent was the arbitrator for the point *in limine* only. Once the point *in limine* was determined, and if the matter were to proceed, another arbitrator was to determine the dispute on its merits. Manifestly from the arbitration agreement the parties conceived the dispute resolution process in two stages before two different arbitrators, the first stage being on the point *in limine*, and the second stage being on the merits.

7. At the hearing of the point *in limine,* the arbitrator was at pains to

[3] Pleadings, page 44
[4] Pleadings, page 42

clarify his mandate. From his exchanges with the parties, the arbitrator understood clearly that his mandate was limited to the point *in limine*. This appears from the following extracts from the transcript:

> "MR ARBITRATOR: As I understand the arbitration agreement, this is phase one of possible two phases. I will not be the Arbitrator in the second phase which is the phase on the merits which as I understand it will only be reached depending on the outcome of this leg of the argument."[5]
>
> "MR ARBITRATOR: My understanding of the issue really relates to, is that the issue I have to decide is confined to the question of whether the employer having convened a disciplinary inquiry and having had the chairman then make a decision both on the merits and the applicable sanction, would be on the applicant's case precluded from as it were internally reviewing that decision on the merits and that sanction and then imposing a different one [albeit?] after hearing further submissions from the employee. And the company's case would be that in appropriate circumstances they can do so.
>
> Now, it seems to me that the, basis on which the company saw fit to review and come to different conclusion was basically that they regarded the decision of the chairman as being wrong, but if one can be severely wrong then that would be their contention is that he, is that the chairman of the inquiry made a decision which was indefensible and regard to the evidence led, both as to the merits and then also to the sanction.

[5] Transcript, page 1 lines 4-8

> Now, I make this point in order to really come to the one I really want to make and that is, it does not seem to me that it is part of my terms of reference to decide one way or the other, whether the chairman of the disciplinary inquiry got it wrong or got it badly wrong. I am dealing with the question of principle and that is whether an employer who has appointed a chairman can then thereafter revisit the result of the disciplinary inquiry. Does either of you see the position differently and perhaps Mr Grogan or Mr Badenhorst …"[6]

8. To the arbitrator's question, the representatives for the parties responded as follows:

> "RESPONDENT REP (Mr Badenhorst): Mr Arbitrator not in principle, however of course you cannot consider the principle, the legal principle without the factual matrix and you have to consider why the employer has in these circumstances indicated that there was a need to adopt this particular procedure and that is where the stated case and the agreed facts come from. So you would have to have regard to that.
>
> Of course you are not called upon to deal with the merits of the charge and whether or not that is serious misconduct and those circumstances that would warrant a dismissal *et cetera, et cetera*. Those aspects you do not have to consider, but off course you will have to consider the procedural, factual or the factual matrix in order to

[6] Transcript, page 2 line 19-page 3 line 20

determine the procedure and the fairness of that procedure which has been adopted."[7]

"APPLICANT REP (Mr Grogan): Save to say Mr Arbitrator or save to add that obviously you would be constrained by the stated case, the facts as set out in the stated case and you cannot go further than that and obviously I am aware that there is certain documents incorporated by reference. …….

It is going to be our submission that this is indeed a matter of principle and can be decided on principle for reasons which I think I will spell out in due course. I am sure that it will be the employer's argument that building on certain case law that you have to have regard to facts in order to make the decision. …..But there is certainly nothing exceptional, well nothing that you said to which we in any sense accept (except?), that is our understanding of the situation, as you have annunciated."[8]

9. The arbitrator clarified further as follows with the parties:

"MR ARBITRATOR: Alright. Well I just, you see as I said, the premise on which the company took the step of internally reviewing rightly or wrongly its own disciplinary enquiry, was that they considered the chairman to have erred in a fundamental way. Now, the reason I raise this issue at the outset is that the parties' agreement contemplates that if I decide this issue before me against

[7] Transcript, page 3 line 21 – page 4 line 9
[8] Transcript, page 4 line 10-page 5 line 8

the applicant, then there will be an arbitration on the merits proper.

Now, the point of principle as I understand it is this. Is it permissible under our Labour Law regime for an employer who regards its own disciplinary enquiry chairman to have erred fundamentally in the decision that he has arrived at, both as to merits and as to sanction, to internally review that decision and if appropriate overturn it? That seems to me to be the issue that I have to decide.

Now, whether, the argument that the chairman of the internal inquiry erred at all or slightly or grievously, seems to me to be a debate that I should not go into, because I am deciding a point of principle and not the merits**."**

APPLICANT REP: Perhaps I ought to say this much and I am in total agreement with what you are saying. The only thing is I anticipated being argued and I anticipate you possibly having to deal with the argument that it is permissible in certain circumstances to do that, whereas our beginning argument, as you will see is that it is never permissible and it is only to that extent that your issue of principle spills over to an extent to the facts of this particular matter. But what we then say is if that should be the approach that you ultimately adopt, then naturally you are constrained to the facts as set down in the state of case (stated case?).

MR ARBITRATOR: Okay. Mr Badenhorst, I am more certain of Mr Grogan's position than I am of yours. Are you happy that I understand my terms of reference correctly?

RESPONDENT REP: Mr Chairman if I may perhaps just clarify how the company understands what the process is that has been adopted, because this is important in order to understand whether or not there is not a misunderstanding as to precisely what your terms of reference are.

The company understands there to be a dual process here or two steps in the process. The first is, to determine whether or not in fairness you, the company could have invoked this review, internal review procedure. That you cannot do in a vacuum, that determination is your determination to do.

The second part of the arbitration would be the arbitration on the merits therefore considering whether or not the sanction that was imposed ultimately was a fair sanction. In order for you to discharge your mandate and your terms of reference as we understand it, you have to look at fairness. Fairness we suppose is a factual basis as well as a legal basis. The point cannot simply just in law be argued and said well, there is no provision for such a review, we have to consider fairness and for that reason you are going to have to (delve) into the facts. You have to accept the facts as they are in the stated case off course, but what you cannot do is, you do not have to determine, on our interpretation, you do not have to determine whether or not the review chairperson was grossly wrong in his approach of the facts.

……

Mr ARBITRATOR: Review chairman or the disciplinary chairman?

RESPONDENT REP: Sorry, the disciplinary chairperson, the first chairperson, whether he was grossly wrong in his interpretation of the facts or the application of the sanction. That you do not have to (delve) into. But what you have to accept is that the company, the company's approach was that, that was not justifiable based on the evidence before you. So to some extent you are going to have to look at that, because that was part of the representations that were made and in order to also understand the justification for why the company had adopted this procedure.

MR ARBITRATOR: Well is it not sufficient for me to accept that the company took the view that the chairman had erred previously?

APPLICANT REP: He says he does, it is on record.

RESPONDENT REP: That is on record.

APPLICANT'S REP: He says it was unjustifiable and grossly unreasonable.

MR ARBITRATOR: Ja. We know that is the, that is the basis on which the company took the attitude that it was entitled internally to review the decision and the question I have got to answer is, whether or not you take the view that the chairman has erred grievously, is it permissible in our law to do so. Okay, Alright."[9]

"MR ARBITRATOR: But you see, just coming back to your submission. If, assume that I decided that in principle and in appropriate circumstances it would be permissible for an employer to review its own chairman, disciplinary chairman,

[9] Transcript, page 5 line 9-page 8 line 14

then it would fall on the next arbitrator to decide whether … [intervenes]

APPLICANT REP: Whether the circumstances are appropriate.

MR ARBITRATOR: Whether it is justifiable or not.

APPLICANT REP: Yes.

MR ARBITRATOR: And whether in doing so the employer acted fairly, because off course, the review process could also be flawed in some other way.

APPLICANT REP: Yes.

ARBITRATOR: Whereas if I am to decide whether the review process here was permissible because of the circumstances which pertained I am getting very close to having to decide whether the review itself is justifiable and then I am infringing on the merits of the matter. So the safer course for me is to stay with the question of principle.

APPLICANT REP: It is certainly the safer course.

MR ARBITRATOR: But then I am wondering whether the, whether the latter point is going to fall between the crux, fall between two …

APPLICANT REP: But I am going to deal with that and that is why I have raised it at this point." [10]

"APPLICANT REP: Because principle, I think let us draw a distinction between theoretical issues and issues of principle… in the classic sense. Theoretically it may well be that you find that the legal principle involved here is either, you could make two findings. Either that you can never hold

[10] Transcript, page 31 line 7-page 32 line 6

> a review. We are going to argue that you must find that or should find that. Or it may be, or it may be your finding that the relevant principle is that you may hold a review in appropriate circumstances.
>
> We would then urge on you, if that is your view to say, what we would urge from the employee's side would be to say that you cannot find on the basis of the agreed stated facts here that the circumstances rendered the decision to hold a review fair. And that really is as far as we can take it within the parameters of the stated case, because you yourself are confined obviously within that factual matrix."[11]

10. From the above exchanges the Court is satisfied that the arbitrator understood that he had to decide the point *in limine* in principle and that his decision may or may not proceed to arbitration on the merits before another arbitrator. He captured his understanding in the following paragraphs of his award:

> "Counsel for Mr van Rensburg argued that in the first instance, I should decide that question in Mr Van Rensburg's favour, without regard for the merits of the company's decision to institute an internal review based on the facts of this case **("the narrow basis")**. In the alternative, he argued that I should rule in Mr Van Rensburg's favour based on the facts placed before me **("the broader basis")**.
>
> 8. The company's attorney argued that:

[11] Transcript, page 32 line 9-line 24

….the only test to be applied in this matter is to determine whether the respondent could review the internal chairperson's findings and sanction in the manner it did, is that of ***fairness***

(my emphasis).

9. In oral argument, I understood the company's contention to be that I was not limited to deciding the matter on the narrow basis, but on the broader basis, having regard to the facts placed before me."[12]

11. The arbitrator reinforced his understanding after considering the judgment of the Labour Appeal Court in *BMW SA (Pty) Ltd v Van der Walt* 2000 [21] ILJ 113 LAC at 117 paragraph 12. In this regard he concluded:

"I therefore consider that whether the employer is considering a hearing *de novo* based on the same charges, or an employer's appeal which is not provided for in the disciplinary code and procedure, or internal review not provided for in the disciplinary code and procedure, the principles in *BMW* apply."[13]

"It follows that a decision by me, based on the principles in *BMW* and other relevant authorities to which reference will be made below, as to whether the company was entitled to review the outcome of its own disciplinary hearing, is not dependent (on) any facts which may emerge in the second arbitration contemplated in the arbitration agreement, on the

[12] Pleadings, page 156 paragraphs 7, 8 and 9
[13] Pleadings, page 158 paragraph 10.5

merits of the dismissal."[14]

"10.10 Simply put, the company must stand or fall by the facts that were before it when it made the decision to institute the review.

10.11 It seems to me that that is what the parties contemplated when they agreed to a two tier arbitration process. The arbitration agreement clearly contemplates that an award by me against the company may (at the very least) result in the matter ending there."[15]

12. Applying this understanding to the case, it meant that this arbitrator had to review the decision of the chairperson of the disciplinary enquiry to determine whether the internal review was justifiable. If it was justifiable then another arbitrator would review the decision of the chairman of the review.

13. In submissions to the arbitrator the employer's attorney, Mr Wessel Badenhorst, emphasised fairness as the criterion for determining the principle as to whether an employer can review the decision of the disciplinary chairperson. This emphasis is captured in the extracts quoted above. The arbitrator also summarised in his award the employer's submissions.[16]

14. In founding its case on the criterion of fairness, the employer relied on

[14] Pleadings, page 159 paragraph 10.8
[15] Pleadings, page 160 paragraphs 10.10 and 10.11
[16] Pleadings, page 161 paragraph 11 of the award

the *BMW* decision.[17] In summary, the majority Court decision [per CONRADIE JA and NICHOLSON JA, ZONDO AJP dissenting] was as follows:

> "In labour law fairness and fairness alone was the yardstick. But a second disciplinary inquiry could be *ultra vires* the employer's disciplinary code. In addition, it would probably not be considered to be fair to hold more than one disciplinary inquiry save in rather exceptional circumstances." [18]

15. Mr Badenhorst then delved extensively into the facts to prove the exceptional circumstances. He began his submission by highlighting certain material facts that arose from the stated case but asked the arbitrator not to delve into them.[19] However, he continued to elaborate that the employer reviewed the decision of the disciplinary chairperson because it was "completely unjustifiable in the circumstances". He described the circumstances as follows:

> "If one were to simply look at what the employee had done in those circumstances, it was sexual harassment and where he erred and I bring that into it, although you do not have to consider it, but it is important for your factual understanding, is that what the chairperson had to determine was that in those circumstances, because the employee had not…Because the employee in this instance had not intended it to be sexual harassment, he found it not

[17] Transcript page 23 line 15-page 24 line 2
[18] *BMW* at page 113 I-J
[19] Transcript, page 9 lines 9-11

> to be sexual harassment, those are one of the factors, completely unjustifiable in these circumstances. And for that the review process was followed."[20]
>
> "He is saying that you cannot just say an employer may review, may adopt this policy *in vacuo.* What he is saying is you have to look at the particular circumstances of the case in order to decide and I would suggest that, that flows from the use of the word fairness as set out in the stated case and in the question posed in a decision which is in turn extracted from a much quoted citation from *BMW* to which I will come in due course."[21]

16. Mr John Grogan, who represented the employee at the arbitration and in this review, concentrated his submissions on the law pertaining to double jeopardy and breach of a so-called "no arrogation law".[22]

17. He founded his argument mainly on the decision in *County Fair Foods (Pry) Ltd v CCMA and Others* 2003 [24] ILJ 355 LAC. *County Fair* supported the employee because the LAC per DAVIS AJA found in that case that the chairperson of the inquiry had a mandate to make a final decision about disciplinary action against the employee and the disciplinary code provided no right to management to interfere in the decision. The LAC confirmed that the CCMA commissioner correctly found that the company code contained no provision justifying the action taken by the managing director in

[20] Transcript, page 18 line 5-15; Transcript, page 30
[21] Transcript, page 30 line 12-19 per Grogan, also Transcript, page 36 line 15-20
[22] Transcript, page 37 line 6-page 38 line 57

interfering with the decision of a properly constituted disciplinary inquiry and that there was no precedent for the company's action. The commissioner's decision was therefore justifiable, the LAC held.[23] In that case, the managing director of the company changed the penalty imposed for an assault from a written warning and suspension without pay to dismissal.

18. The arbitrator paid less attention to the submissions for the employee. Instead, he preferred to determine the dispute mainly on submissions for the employer. To this end, he began by assuming in favour of the employer that:

> "…an employer is entitled unilaterally to review its own disciplinary procedure in a manner not expressly or by necessary implication catered for in its disciplinary code and procedure on the same grounds as the Labour Court will be entitled to review and set aside an arbitration award by a CCMA Commissioner who decided to reinstate a dismissed employee."[24]

19. He motivated the basis for his assumption.[25] In essence, he accepted that a disciplinary code is not set in stone. It is a guideline from which an employer may deviate for exceptional and compelling reasons. A shockingly inappropriate outcome would suggest that the disciplinary chairperson failed in his duties. When this happens, employers and

[23] County Fair, page 356 G-H
[24] Pleadings, page 164 paragraph 19
[25] Pleadings, page 164-165. paragraph 19.1-19.5

employees should not be allowed to snatch at a bargain. A hearing to cure a material irregularity was not against public policy. So the arbitrator reasoned.

20. As this motivation supported the employer's case, the employer did not question it. However, the employer did criticise the arbitrator for allegedly making the assumption without deciding the very question that the parties asked him to determine.

21. In the opinion of the Court, the assumption was in favour of the employer. For that reason alone, the employer is not entitled to challenge it. Furthermore, as the arbitrator motivated his assumption, it was not irrational. It was also not unfounded because it was consistent with the submissions for the employer. The arbitrator based his assumption on general principles and not on the specific circumstances of the dispute before him. As stated above, the assumption favoured the employer and cannot be challenged by the employer and the case law cited it relied on.

22. After making the assumption that the employer could review the decision of the chairperson of the inquiry, the arbitrator turned to the circumstances of the case for justification of the review. This is precisely what Mr Badenhorst requested him to do. Mr Badenhorst emphasized fairness as a criterion for justifying a review. He invited the arbitrator to apply the legal principle to the factual matrix to ensure

a fair result. [26]

23. Although the arbitrator found that the employer gave no reasons in its notice to the employee to review the outcome of the disciplinary inquiry he assumed, again in favour of the employer, that it must have made every effort to justify the review to the chairperson of the review.

24. The arbitrator then analysed the decision of the chairperson of the inquiry. He found that there was a wealth of evidence before the disciplinary chairperson of a culture of ribald conversation with sexual connotations which made it difficult to conclude that the employee's utterances were unwanted or that the employee knew that his conduct was unwanted. The offended employee should have made known that his conduct was offensive. So the arbitrator reasoned.[27] He accordingly found the employer's criticism of the chairperson's findings on the first two charges fallacious. [28]

25. He also disagreed with the employer's submission that charges 1 and 2 were irreconcilable with each other; finding the employee guilty on the second charge of using abusive language did not amount to guilt on the first charge of sexual harassment. [29]

[26] Transcript, page 7 line 22 and page 8 line 2
[27] Pleadings, page 169 paragraph 29.2 and page 170 paragraph 29.3
[28] Pleadings, page 167 – 8 paragraphs 27.1 and 29
[29] Pleadings, page 170 paragraph 29.4

26. The arbitrator found no suggestion that the final written warning for the second charge would not have had the desired effect or would have led to an irretrievable breakdown in the employment relationship.[30]

27. The arbitrator also rejected the employer's criticism that the chairperson of the inquiry should have found the employee guilty of sexual harassment because, as a senior employee, the employee had to maintain a proper standard of decorum. The arbitrator found that the charge of failing to maintain a proper standard of decorum was distinct from sexual harassment. In any event, by finding the employee guilty on the second charge the arbitrator concluded that the chairperson of that inquiry had found, in essence, that the employee was not maintaining a proper standard of decorum.[31]

28. With regard to the assault charge, the arbitrator correctly observed that the chairperson of the review was wrong to conclude that the employee was guilty of indecent assault. That is not a finding that the arbitrator needed to make. The arbitrator had to evaluate the decision of the chairperson of the enquiry, not the review, to assess whether it justified a review. If the arbitrator concluded that the decision of chairperson of enquiry had to be reviewed, then only was the decision of the review chairman to be reviewed by another arbitrator.

[30] Pleadings, page 171, paragraph 73
[31] Pleadings, page 171, paragraphs 30 - 32

29. However, on this issue and in so far as the arbitrator considered the decision of the chairperson of the review, he did so on the invitation of Mr Badenhorst. Furthermore, when he did so he showed up the reasonableness of the decision of the chairperson of the enquiry. In that context, by delving into the decision of the chairperson of the review the arbitrator did not stray from his terms of reference.

30. Although the arbitrator accepted the employer's submission that a violent assault could be sanctioned with dismissal, in the circumstances of this case he found that the employer used the review chairperson's finding of guilty on the sexual harassment and abusive language charges to colour and aggravate the circumstances of the assault.[32] As the arbitrator pointed out when engaged Mr Badenhorst to understand his terms of reference, the arbitrator had to consider only the evidence before the chairperson of the disciplinary to determine whether the employer was entitled to review his decision.

31. The arbitrator concluded that the employer did not satisfy the test of proving that the chairperson of the disciplinary inquiry did not apply his mind properly to arrive at a conclusion that the employee's conduct was sufficient to justify dismissal, and that his findings and conclusions were so grossly unreasonable as to warrant interference on an internal review. [33]

[32] Pleadings, page 175 paragraph 47
[33] Page 175 – 176 paragraph 48

32. Having set the framework in which the arbitrator was required to determine the point *in limine*, which framework included a consideration of the factual matrix to justify the fairness of the decision of the employer to review the outcome of the disciplinary inquiry, the employer cannot contest the award.

33. The court finds therefore that the arbitrator did not commit a gross irregularity on either ground of review.The application for review must fail.

ORDER

34. THE APPLICATION IS DISMISSED WITH COSTS.

_____

Pillay D, J

Date Heard: 4/09/08 in Braamfontein

Date Delivered: 8/09/08 in Durban

Date Edited: 26/09/08

Appearances:

For the Applicant: M Pillemer SC; A Myburgh instructed by Leppan Beech

For the Respondent: Adv J Grogan instructed by Serfontein Viljoen & Swart

TRANSCRIBER'S CERTIFICATE

This is, to the best abilities of the transcriber and proofreader, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

RUSTENBERG BASE METAL REFINERIES (PTY) LTD
v
SOLIDARITY AND OTHERS

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HELD AT DURBAN

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APPLICANT	:	RUSTENBERG BASE METAL REFINERIES (PTY) LTD
RESPONDENT		SOLIDARITY AND OTHERS
ON BEHALF OF APPLICANT	:	MR BADENHORST[?]
ON BEHALF OF RESPONDENT	:	MR GROVEN[?]
INTERPRETER	:	NONE

REPORT ON RECORDING

Slight echo on recording – sound was indistinct occasionally.